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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 458

EMPIRE STATE EXPRESS, INC.,
*Petitioner,*

vs.

TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING ARGUMENT.

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TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Empire State Express, Inc., a Georgia corporation, prays that a writ of certiorari issue to review the decision, order and judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 7, 1961, reversing with directions a judgment dated March 31, 1960, entered after and upon a verdict dated March 18, 1960, by the United States Court for the Columbus Division of the Middle District of Georgia.

## I. OPINIONS BELOW.

The opinion of the Court below (Appendix A, *infra*, pp. A1-A18) is reported in F.2d Advance Sheet No. , pp. - .

Prior to the time of the filing of this action in the District Court, the National Labor Relations Board, on August 16, 1956, in Local Union No. 728 of Teamsters and Empire State Express, Inc., Case No. 10-CC-131, 116 NLRB 615, had reversed the Trial Examiner and had decided that Respondent herein was guilty of an unfair labor practice and a boycott prohibited by LMRA Section 8 (b) (4) (A) and (B) of the Act (29 U.S.C. 158). Petitioner herein urged the District Court to rule, on ground of *res adjudicata* and estoppel, that the NLRB decision was binding on Respondent herein; but the District Court rejected the contention, on December 16, 1959, prior to the trial. (See copy of opinion Appendix B, *infra*, pp. A19-A21).

## II. JURISDICTION.

(1) The action in the District Court was brought by Petitioner against Respondent, for damages sustained by Petitioner, under authority of Sections 303 and 301 (29 U.S.C. 187 and 185) of the Labor Management Relations Act, 1947, hereinafter designated the "Act", amended as set forth below; and the decision and judgment of the Circuit Court (Appendix A, *infra*, pp. A1-A18) were entered on July 7, 1961.

(2) No rehearing was sought by Petitioner.

(3) Petitioner did apply to the Circuit Court for a stay of the mandate; and Petitioner, having given bond

for costs and damages in the sum of $3,000.00, was granted a stay effective for ninety (90) days from July 28, 1961 the date of the order.

(4) The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## III. QUESTIONS PRESENTED.

(1) Whether Respondent violated Section 303 (a) (1) or 303 (a) (2), or both (29 U.S.C. 187 (a) (1) and (2) and 185) of the Act by inducing or encouraging the employees of Service Cartage Company, a partnership, to leave their jobs and work and, along with striking employees of Petitioner, on September 13, 1955, to commence picketing and engaging in a strike, at premises used by Service and other motor vehicle common carriers to and from whom Petitioner delivered and received shipments, and used by Petitioner as a motor vehicle common carrier, to deliver and to receive from connecting carriers in Atlanta, Georgia, intrastate and interstate shipments; and by inducing and encouraging said employees of Service to continue to so picket and strike until the United States Court for the Northern District of Georgia, on application by the NLRB, enjoined said picketing on November 3, 1955; when, during all said period from September 13 to November 3, 1955, the signs carried by said pickets stated only that the strike was against Petitioner and the picketing was carried on at times when no employees of Petitioner were present on said premises and at times when no business was being transacted by Petitioner on said premises, Petitioner being a Muscogee County, Georgia, corporation, with its principal office and place of business located in Columbus, Muscogee County, Georgia.

(2) The opinion of the lower Court is vague and imprecise and so far below the demonstrated abilities of each of the Judges that composed the Panel that it is not understandable. Why?

(3) The lower Court so completely distorted both the provisions of Section 303 (a) (1) and (2) of the Act and the intent of Congress that, under the decision and judgment rendered, no secondary boycott could be committed by a union under the ruling made.

(4) There were controverted questions of fact, and Petitioner and Respondent placed different interpretations on proven facts, all submitted to the jury for verdict; but nevertheless the lower Court usurped the function of the jury in passing on such issues, and emphasizing trivia instead of substance, usurped the proper function of the jury and decided the entire case on assumptions based on trivia.

## IV. STATUTES INVOLVED.

(1) "Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

> "(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing

in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act:

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (2) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

(29 U.S.C. 187.)

(2) Section 301 of the Act insofar as the same may be made applicable to the provisions of Sec. 303 of the Act.

(29 U.S.C. 185.)

(3) The later amendments to the Act are not involved and are not material to the decision to be made by this Court.

## V. STATEMENT.

### A. Jurisdiction in District Court.

The Complaint, as filed in the District Court by Petitioner, was brought against Teamsters Local No. 728 and against Teamsters International Union, as Defendants. Thereby Petitioner sought to recover against the two Unions a judgment for $200,000.00 damages plus $200,-

000.00 of punitive damages, for violation of Sections 303 and 301 (29 U.S.C. 187 and 185). The District Court struck from the Complaint the demand for punitive damages, as well as some other averments of the Complaint. Petitioner, by voluntary action, dismissed the suit as against the International Union.

On March 18, 1960, the trial to a court and jury resulted in a verdict of the jury in favor of Petitioner for the amount of $76,940.30, which verdict was followed on March 31, 1960, by a judgment in said amount against Respondent.

**B. Preliminary.**

Before the trial, the District Court having ruled that the testimony delivered by Rowlenson (a stockholder and an officer of Petitioner who died some months prior to the trial) was admissible and could be read to the jury from the NLRB transcript, it was stipulated between Petitioner and Respondent that any or all of the testimony taken before the Board, in NLRB Case No. 10-CC-131, Local Teamsters No. 728 and Empire State Express, Inc. (116 NLRB 615), might be read to the jury as evidence in the action; and that either Petitioner or Respondent or both might supplement that testimony by testimony from other witnesses. Petitioner read to the jury in this action all the testimony introduced in behalf of the Board in that NLRB case, and Respondent read to the jury almost all of the testimony introduced therein in behalf of Respondent.

In addition, both Petitioner and Respondent used tools of discovery, prior to trial, with the result that Admissions made by Respondent in the pleadings (Transcript of Record pp. 71-76), Admissions made by Respondent (Rec. pp. 77-91), and Admissions made by Petitioner (Rec. pp.

91-98) were typed, numbered, agreed upon and read to the jury. Thus, almost every word of testimony, which had been introduced before the Board in the unfair-labor-practice-boycott case, was placed by Petitioner and by Respondent before the jury as evidence in the trial of this case. Besides, there was additional undisputed testimony with regard to the secondary boycott issues submitted to the jury by Petitioner, which served to strengthen the position of Petitioner that Respondent had committed a prohibited boycott. In the end, there was not a single controverted or contested fact left for the jury to decide with regard to the boycott issue: all the facts relied upon by Petitioner were admitted by Respondent, and all the facts relied upon by Respondent were admitted by Petitioner.

*The only issue between Petitioner and Respondent on the boycott question was completely legal. Stated succinctly in the form of a question, it was: Was or was not Service Cartage Company "any other person" within the meaning of Section 303 (a) (1) of the Act, and/or "any other employer" within the meaning of Section 303 (a) (2) of the Act, than was or is Petitioner.*

For example, there was no factual issue on the question as to whether or not Respondent had or had not "induced or encouraged" the employees of Service Cartage Company "to engage in a strike" and picketing within the meaning of Section 303 of the Act; for the testimony was undisputed that exactly that occurred.

On the legal issue stated above, the contentions of Respondent were that Service was not "another person" or "another employer", because Service was an "agent", or an "ally", of Petitioner, or the relationship between the two was "alter ego", and that Service was not a "neutral em-

ployer" entitled to the definitions of "another person" or "another employer"; and the contentions of Petitioner were that Service was an "independent contractor" and was such a "neutral employer."

### C. The Facts.

#### 1. Relied On by Petitioner.

Prior to August 1, 1955, ACA Motor Lines, Inc., hereinafter designated "ACA", which ceased to do business on August 1, 1955, was engaged in hauling freight as a motor vehicle common carrier between various cities in the State of Georgia. ACA had its principal place of business in Atlanta, where it also engaged in city pickup and delivery of freight in conjunction with its over-the-road operations. All ACA drivers and cartage and warehouse employees were members of Respondent, but ACA and the Respondent were not parties to a signed contract. Instead, ACA more or less observed provisions of two area wide contracts between other employers and various Teamster Locals, including and similar to Respondent.

On July 31, 1955, ACA ceased business, after selling its franchises and some of its equipment to Petitioner. Petitioner is a common carrier of intrastate and interstate freight by motor vehicle with its principal office and place of business in Columbus, Georgia. Petitioner was incorporated in May, 1955, and its stock at all times material hereto was and is owned by two individuals, C. O. Livingston and W. H. Rowlenson, each of said individuals owning fifty per cent of said stock. Both Livingston and Rowlenson were also the sole owners of the stock of Allied Freight Service, Inc., a local cartage service located in Columbus, Georgia, which had prior to August 1, 1955, for some time handled ACA's pickup and delivery in Columbus.

On August 1, 1955, Petitioner began operations under the franchises it purchased from ACA, with its principal place of business in Columbus, about one hundred miles from Atlanta. The franchise territory of Petitioner was from Atlanta southward to Columbus via Newman, La-Grange and West Point, and southward from Columbus to Thomasville via Americus and Albany, Georgia. For Petitioner in Columbus, Allied Freight Service, which had performed a like service for ACA, continued to handle local cartage for Petitioner. In Atlanta, Georgia, however, where ACA had performed its own local cartage, Petitioner chose to engage Service Cartage Company to handle its Atlanta cartage.

During all times material hereto, Service was a partnership composed of Jack Viness and Phil Busby. That partnership was formed in July, 1955, to handle cartage work in Atlanta for Petitioner and for other trucking lines which might later desire said service. Neither Viness nor Busby had any former connection with ACA or with Petitioner. Petitioner and Service reached an oral agreement for handling the local cartage in Atlanta of Petitioner, said agreement being made in July, 1955. Service did make arrangements with two other trucking lines besides Petitioner to handle their Atlanta cartage, but this did not occur until after the picketing began on September 13, 1955.

The agreement between Petitioner and Service, effective August 1, 1955, being the day on which both Petitioner and Service began operations, was of indefinite duration, subject to cancellation by either party upon a thirty-day notice. Under said agreement, as the representative of Petitioner in the Atlanta area, Service was obligated in general to provide a terminal, employees and equipment;

to unload freight brought to the terminal in trucks of Petitioner, and to make deliveries in Service trucks to local consignees and or to interline carriers; to pick up freight in Service trucks from local consignors and interline carriers and transport it to the terminal and there load it into trucks of Petitioner; to perform billing functions in connection with such operations; and to solicit business for Petitioner from interline carriers and local shippers in Atlanta. Under said agreement, Service was obligated to pay all rentals, all utilities, and for all help and work in connection with local Atlanta cartage; Petitioner was obligated to pay Service at the rate of 25 cents per hundredweight for all Petitioner's freight handled by Service. Payment for such shipments was made by consignors or consignees to Petitioner; Petitioner paid Service without respect to whether Petitioner effected collection of freight charges. Under said oral agreement as between Petitioner and Service, responsibility, in substance, was placed upon the one having custody of the shipment at the time of loss or damage. And under said agreement Service was permitted to handle local cartage in Atlanta for other carriers who were not competitors of Petitioner.

When Service began operations, it continued in its employment the local cartage employees who had worked for ACA. Like ACA, Service recognized Respondent and abided by the terms of the Teamsters' area cartage agreement but entered into no agreement with Respondent to do so. Service leased Atlanta terminal facilities at a location other than that formerly occupied by ACA in Atlanta from another carrier on a monthly basis.

The Atlanta terminal, where the picketing took place, consists of two buildings, one of which was occupied by Perkins Freight Lines, and the other by Tennessee-Carolina Freight Carriers, Service, and Youngblood Truck Lines

(Youngblood was Service's Lessor), all motor carriers of freight. All the employees of Youngblood and Tennessee-Carolina were represented by Respondent as bargaining agent; and those employees, as well as those of Perkins, continued at work during the picketing and strike.

Prior to July 31, when ACA went out of business, ACA employed five over-the-road drivers who resided in the Atlanta area and were dispatched by ACA from ACA's Atlanta terminal. During the latter part of July, 1955, Petitioner engaged said five drivers for future employment, but then orally and later in writing informed said drivers that they would later be compelled to move to Columbus, because the Petitioner intended to manage its affairs completely and to dispatch from Columbus, Georgia. Petitioner, aware that said drivers had housing problems in connection with moving their homes from Atlanta, did not set any definite date for said drivers to move to Columbus, but arranged with said five drivers for them to continue to work out of Atlanta and arranged with Jack Viness, a partner in Service, to do the dispatching of said five drivers from the Atlanta terminal. Neither Viness nor Service received compensation from Petitioner for performing such dispatching from the Atlanta terminal.

For the period from August 1, 1955 to August 29, 1955, Viness, without compensation to Viness, as an accommodation to the five over-the-road drivers and as an accommodation to Petitioner, performed the following services for Petitioner, but after August 29, 1955, never again performed such functions: Viness handled Petitioner's dispatching operations in Atlanta; assigned the drivers to their trips, generally on the basis of rotation, and gave them further instructions with reference to their trips, including telling the drivers which trailers of Petitioner to take out of Atlanta and which trailers they should pick up

and bring back to Atlanta; maintained records of trips made by each driver, and forwarded those records and drivers' log books to Petitioner in Columbus for payroll purposes; received instructions from Petitioner in Columbus by telephone in regard to dispatching details; Petitioner sent the drivers' pay checks from Columbus to Atlanta, where Viness distributed them to the drivers at the Atlanta terminal; the drivers informed Viness that they desired to remain in and to live in Atlanta, and Viness agreed to talk to officers of Petitioner, saying that he would "try to keep at least some of them" stationed in Atlanta; in talking with Viness about that matter, Rowlenson, Vice President of Petitioner, stated that "he felt that he could domicile some of them in Atlanta * * * and would let" Viness know, but no decision as to where the drivers would live and be domiciled was made before September 13, 1955, when the picketing and striking began.

On August 26, 1955, a work stoppage occurred with regard to the condition of the tractors of Petitioner (which, under the Act may have amounted technically to a strike), for the over-the-road drivers ceased to work for Petitioner and never again worked for Petitioner.

Respondent first approached Petitioner on July 28, 1955, at which time Respondent represented to Petitioner that Petitioner would be bound by the same agreement which bound ACA with respect to the over-the-road drivers, and stated that it would mail a union contract form to Petitioner in Columbus. This Respondent did the next day, and the letter from Respondent to Petitioner contained two union contract forms, one being the over-the-road form, and the other covering local drivers, local pickup and cartage employees and warehousemen of Petitioner residing and located in Columbus, Georgia. Respondent in said letter requested Petitioner to sign and

return both of said contracts. Petitioner did not reply to this request of Respondent.

About August 23, 1955, some one or more persons unknown as far as the testimony shows, having complained to the Interstate Commerce Commission about defects in the trucks of Petitioner, the I.C.C. approved removal of said trucks to Columbus for inspection and repairs. On August 26 four of the five regular over-the-road drivers of Petitioner residing in Atlanta, Georgia, including the two who were assigned to the runs to be made that day, appeared at the terminal in Atlanta under the influence of liquor. The said four over-the-road drivers stated that they would not drive the trucks of Petitioner because of the trucks' condition. Service telephoned this fact to Respondent and Respondent sent a representative to the terminal to inspect the trucks, and Viness talked to said representative of Respondent about the condition of the drivers. Although one regular driver and a part-time driver who had not been drinking expressed a willingness to make the scheduled runs, the other drivers, all members of Respondent, persuaded them not to do so. The following day Petitioner sent other of its employees from Columbus to Atlanta to move the trucks. After August 26, said five over-the-road drivers did not return to work for Petitioner, and Petitioner continued operations with other employees working out of Columbus, Georgia, until picketing began on September 13, 1955. Petitioner did not give notice of discharge to said five drivers, but continued its over-the-road transportation of freight with drivers dispatched from Columbus, Georgia.

On August 29, 1955, Weldon Mathis, Secretary-Treasurer of Respondent, came from Atlanta to Columbus and appeared at the offices of Petitioner and requested to have

a conference with either Livingston or Rowlenson. Both Livingston and Rowlenson agreed to talk with Mathis as soon as they could have the Attorney for Petitioner present. Swinson, that attorney, came promptly and a conference was held. Pertinent to the decision of this Court, Swinson stated to Mathis: " 'Now there are some things that we have got to recognize. If those drivers don't return to work pretty soon they will be regarded by Empire State as no longer employees. In that event—and even if they are employees of Empire State, and may be permitted to vote in a union election held by the National Labor Relations Board, we want to call your attention to the fact that if Empire is not bound because of the purchase to sign a contract with you, we want the Union to file a petition for an election.' " * * *. Mr. Swinson continued: " 'I'll recommend to Empire State Express to sign a contract with you'—this particular contract—hand me that (Leaving witness stand to get contract)—a contract of this type, as contained in this book—'for the over-the-road drivers.'

"These other contracts here with reference to the pick up and delivery were before us, and I indicated that insofar as we had any pick up and delivery employees, employed by Empire State Express, we'd sign this contract also with them, provided nothing had to be paid under those contracts except the wage rates.

"At that time Mr. Mathis and myself both knew that Empire State from August 1 had been paying the wage rates that the drivers had received from ACA. This meant, in other words, that I was offering to sign a contract with him for a year for these two contracts, provided it was based upon wages alone.

"In that connection I told Mr. Mathis that Empire State was a business that had just started and could not

afford to sign contracts with all of the pensions, paid holidays, fringe benefits, things of that kind contained in the Teamsters' contracts; that if Empire State signed such a contract that if we got on our feet at the end of the year—"

Mr. Swinson continued: "That at the end of the first year if Empire State was on its feet and able to make the conventional payment under these contracts that I would recommend that they do it but that if Empire State then was not able financially to make all of those payments I would recommend that they make part of them that they could pay, and we would negotiate about the others and if we needed additional time we want them to give it."

Mr. Mathis said: "I'm not authorized to entertain such a proposition."

Mr. Swinson said: "I understand that, Mr. Mathis."

Mathis agreed he would take the matter up with his superiors.

Mr. Swinson continued: "Now, Mr. Mathis, before you leave, on the chance that you can't—that you are unable to do anything about this then it looks like to me now, although I don't want to give our final answer now, that we will have to tell you we can not recognize you, and in that connection there are some other things that I want to say to you.

"You can file a petition with the National Labor Relations Board, you can claim that you represent a majority of our employees and make us bargain if you are able to prove that, and if you can't prove it to us you can file a petition with the National Labor Relations Board that we are engaged in an unfair labor practice and all that will be legal. You can come to Columbus and cause a strike, if you can, against us and that will be legal. Now, on the other hand, there are some things that you can do that will be illegal. There are some type strikes that you could pull

which would be illegal, and there are some type strikes that if you pull probably would break this company and crush it financially, and if you engage, or the members of your Union engage, in any illegal act we are going to hold you responsible for it."

Later, Mathis, on September 7, 1955, wrote to Petitioner again demanding recognition, and Swinson, on September 9, 1955, composed the following letter which Petitioner, acting by Rowlenson, mailed to Mr. Mathis of Respondent in Atlanta:

"Receipt is acknowledged of your letter of 7 September 1955. You state in that letter that you have never received a direct answer from us as to our position in regard to recognizing Local Union No. 728 as the bargaining agent for our over-the-road drivers.

"In that statement we believe you are somewhat in error for we understood that our attorney, W. Edward Swinson of Swinson, Elliott and Schloth, Columbus, Georgia, informed you of our position last week and you said you would call him last Friday to advise him of your final decision.

"At any rate, it is our position that we are not bound by the relationship which existed between the Union and the drivers with ACA Motor Lines, for the reason, among other things which are too lengthy to state, that the Union had no signed or executed contract with ACA Motor Lines. We also are of the opinion that if it is decided that the drivers in Atlanta, independently of the ACA Motor Line relationship with the Union, were ever employed by us that such employment ceased when they were offered work and they all refused to perform it when some if not all were drinking.

"We cannot recognize the Union as the bargaining agent of our employees because we do not believe that you represent the employees who work for us, and we do not consider the ACA drivers living in Atlanta or in that vicinity as our employees. We are compelled to take this position for the many reasons stated to you by us and by Mr. Swinson.

"We wish there were some way to work out our problems with you, but we feel that we are unable to do that because the limitations under which you are compelled to represent the Union give you no discretion with which to consider our difficulties." (Record 605-606).

The telephone conversation referred to in the letter above was between Mr. Swinson and Mr. Mathis, and Mr. Mathis told Mr. Swinson that he was not ready to reply to this business about changing the contract and that he, Mathis, would call Swinson the following Friday and notify Swinson of the final decision, but Mathis did not do so.

(Shown by undisputed testimony of Swinson with Mathis present, later testifying, but not denying Swinson's testimony: Record pp. 599-608.)

On the same day, August 29, Petitioner discontinued the arrangement with Viness to act as the dispatcher for Petitioner in Atlanta; and from that time on, Petitioner conducted its dispatching operations in Columbus, telephoning Service to ascertain the number of loads waiting in Atlanta for transport to the south.

During the period from September 7 to September 10, 1955, Respondent again requested recognition as representative of the five over-the-road drivers, as well as other employees of Petitioner in Columbus, and Petitioner refused to grant such recognition.

On September 13, 1955, Respondent placed pickets at the Atlanta terminal. The pickets carried signs stating only that Respondent was on strike against Petitioner. As the picketing began, a representative of Respondent, during the work hours of employees of Service, told Service employees to join the strike and they did so, and some employees of Service at times joined in and participated in the picketing. During the afternoon of September 13, Respondent told Petitioner that the strike was due to Petitioner's refusal to recognize Respondent; and Rowlenson (deceased before the trial of this action) stated that Petitioner had no over-the-road drivers who were members of Respondent, because the picketing drivers had "refused to work, and that any time anyone refused to work * * * they automatically quit and left (the) employ" of Petitioner.

The picketing was confined to the Atlanta terminal and was engaged in continuously during business hours and at times when the vehicles of Petitioner were not present at the terminal and Petitioner was not carrying on any business operation at the terminal. The employees of Perkins, Tennessee-Carolina and Youngblood, the other carriers who shared the terminal premises, continued to work. Operations of Petitioner at the Atlanta terminal and at other points south of Atlanta and operations of Service in Atlanta were reduced virtually to a complete halt, until picketing was temporarily enjoined on November 3, 1955, by a Section 10 (1) Injunction Proceeding instituted by the NLRB in the United States District Court for the Northern District of Georgia.

The picketing and strike reduced the business of Petitioner to a trickle. For the month of August, 1955, Petitioner had transported 3,799,357 pounds of freight, with gross revenue of $23,629.89; from September 1 to 13 in-

clusive, 1,156,829 pounds with revenue of $8,348.48; from 9-13-55 to 9-30-55, 427,665 pounds with revenue of $2,-165.97; for October 474,453 pounds with revenue of $2,-452.18; and from November 1 through 3, 72,358 pounds with revenue of $461.67. Picketing was enjoined on November 3, 1955. From 11-4-55 to 11-30-55, Petitioner transported 2,485,839 pounds with gross revenue of $17,-845.50. (Figures taken from Petitioner's Exhibit No. P-9 introduced without objection from Respondent.) No freight of any consequence was delivered by Service to Petitioner, or was transferred by Petitioner to interline carriers in Atlanta, or received by Petitioner from interline carriers in Atlanta from September 13 to November 3, 1955; and that also was true of Perkins, Tennessee-Carolina and Youngblood, the three carriers using the same premises as Service. The freight hauled by Petitioner from September 13 to November 3 was transported to or from points on the line of Petitioner south of Atlanta; and during said period all interline carriers in Atlanta, which had previously done business with Petitioner, including the three named, as well as Service, ceased to do business with Petitioner during the period of picketing.

Neither Petitioner nor Livingston nor Rowlenson owned any interest in Service of any kind whatsoever; and neither loaned money to Service, or to either of the partners, to finance the business or operations of Service. Neither Service, nor Viness, nor Busby owned any stock of Petitioner, nor did they, or either of them, in any way finance the business or operations of Petitioner. There was no control in any form whatsoever by Petitioner of Service, or by Service of Petitioner.

Except as may be stated herein, Petitioner managed its own affairs and none of the affairs of Service; and Service managed its own affairs, and none of the affairs

of Petitioner. Petitioner hired all its employees and supervised, except as the temporary dispatching by Viness of the five over-the-road drivers from Atlanta may indicate, all of its employees; and Petitioner managed and directed its own labor relations between itself and its employees to the extent that may be indicated in the argument made below. Service hired, supervised and paid all of the employees of Service, and Service managed and directed the labor relations of its employees and dealt with Respondent as the representative of the employees of Service, and Petitioner did not participate in any way in the labor relations between Service and Respondent.

At no time prior to September 13, 1955, or material to the decision of this certiorari by this Court, did Respondent ever file with the Tenth Region of the National Labor Relations Board, Atlanta, Georgia, a petition for an election of the Respondent as the bargaining representative of any of the employees of Respondent.

The decision and judgment of the lower Court "REVERSED WITH DIRECTION", the judgment of the District Court, in the following language:

> "The District Court erred in denying the Defendant's (Respondent's) motion for a directed verdict and *its motion for judgment notwithstanding the verdict.* The judgment is therefore reversed and the cause remanded with directions to enter judgment for the Defendant."

While Petitioner believes that, if the motion for directed verdict should have been granted, it was unusual and irregular for the lower Court to have discussed the charge to the jury made by the District Judge and to have directed that the District Court grant the motion of Respondent for judgment notwithstanding the verdict. Petitioner is

printing as "Appendix C" to this certiorari so much of the charge delivered to the jury by the District Court as may be material to the questions presented to this Court.

**2. (Facts) Relied On by Respondent.**

Service acquired six trucks, five by purchase and the other which was loaned to Service by Petitioner without charge. These trucks bore no inscription to indicate their ownership or operation. At times to avoid delay and expense of transferring freight, Service tractors pulled trailers belonging to Petitioner which bore Petitioner's name.

There was no sign at the Atlanta terminal indicating that Service or Petitioner was an occupant of the Atlanta terminal. The telephone used at the Atlanta terminal was paid for by Service, but was carried in the name of Petitioner. Both Petitioner and Service distributed to shippers generally printed circulars which advertised the Atlanta terminal as that of Petitioner, which circulars made no mention of Service.

After August 29, 1955, when Viness ceased to act as a dispatcher of the five over-the-road drivers in Atlanta, and after which date Petitioner conducted all its dispatching operations in Columbus, telephoning to Service to ascertain the number of loads waiting in Atlanta for transport southwardly, Petitioner at no time gave notice to Respondent or any of the representatives of Respondent of the change in its dispatching operating procedure.

There was no Atlanta telephone listing for Service. The telephone was, on a number of occasions, answered "Empire State Express". One of the local drivers testified that, "when I walk in the plant (of a prospective shipper), I say 'Have you got anything for Empire State Express.'"

There were no signs on the terminal indicating that it was the terminal of either Service or Petitioner. Practically all the freight handled by Service was for the account of Petitioner from August 1 to September 13, 1955. None of the six trucks used by Service bore an inscription which would indicate its ownership or operator.

Respondent contended that Viness had authority to and actually did settle some of the grievances relating to the five over-the-road drivers, but this contention was controverted by Petitioner. To reinforce this position of Petitioner, Viness testified as follows:

> "Q. What was the first information that you had regarding picketing?
>
> "A. Well—
>
> "Q. Or a strike at the terminal?
>
> "A. Well, Mr. Johnson walked in and introduced himself and told me he was the representative of the Local 728.
>
> "Q. What date?
>
> "A. That was on the 23rd, I believe. I mean on the 13th.
>
> "Q. September 13th?
>
> "A. Yes.
>
> "Q. Is that the day the picketing began?
>
> "A. The day the picketing began and it was about eight o'clock or a quarter of eight and he said at ten-thirty, he was going to strike me. I asked him why he was going to strike me and he said because I represented Empire State Express *and I told him I had nothing to do with Empire's labor disputes and he said, well, nevertheless, at 10:30 we are going to strike you.* It turned out that he struck me at ten o'clock instead of ten-thirty." (Record pp. 414-415).

## VI. REASONS FOR GRANTING WRIT.

1. The rationale of the decision and judgment of the lower Court is in conflict with other decisions of the Fifth Circuit and with other decisions rendered by the United States Courts of Appeal for other Circuits.

2. The lower Court decided an important question of federal law, which has not been, but should be settled by this Court.

3. The lower Court decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States.

4. The lower Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States.

## VII. ARGUMENT.

### 1. The Decision of the NLRB Trial Examiner.

The Trial Examiner, Local 728 Teamsters and Empire State Express, Inc., No. 10-CC-131, 116 NLRB 615, rejected each of the following contentions of Respondent regarding the relationship between Respondent and Service, to-wit: agency, ally, *alter ego;* but admittedly without Board or Court authority, ruled that Service was not the "disinterested neutral employer" the statute was designed to protect, because the business "operations" of Petitioner and Service were so "enmeshed" that Service did not amount to "another person" or "another employer" within the meaning of the Act. One among many strained positions taken by the Trial Examiner to reach that result is con-

tained in this statement: "Since Viness is a partner in Service Cartage, his activities in this respect (dispatching, etc.) were Service Cartage's activities in behalf of Empire" (Petitioner). Since the services rendered by Viness in regard to dispatching for Petitioner were without compensation, were for accommodation of Petitioner and the drivers, and were to be temporary until the drivers moved to Columbus, just why from any standpoint, legal or otherwise, must the acts of Viness have been construed to be the acts of Service!

**2. The Decision of the National Labor Relations Board in Local 728 Teamsters and Empire State Express, Inc., No. 10-CC-131, 116 NLRB 615.**

This decision of the Board reversed the Trial Examiner and rejected the definition or theory of "neutrality" applied by him to Service and Petitioner. And (aside from *res adjudicata* or estoppel) even though the Board decision was not binding upon the lower Court, it should have received from the Fifth Circuit that thorough consideration, which is given decisions of the Board by this Court and Circuit Courts on the principle of "expertise." The decision of the Fifth Circuit ignored two rulings of the Board in the realm of "expertise": (a) situs of the labor dispute:—the Board held that since Petitioner's principal office and place of business was in Columbus, Muscogee County, Georgia, and not in Atlanta, and Respondent was demanding recognition and union contracts from Petitioner, that despite the work stoppage and strike of the drivers in Atlanta on August 26, 1955, the situs of the labor dispute was in Columbus, Georgia, and that said situs continued to be to September 13, 1955, and thereafter; and (b) the "appraisal date", to determine whether Respondent was guilty of a prohibited boycott:—the Trial Examiner

said August 26, 1955, the date of the work stoppage in Atlanta; the Board reversed and held it to be September 13, 1955, the first date of picketing, the first date on which the employees of Service struck, and the first date on which any action of Respondent violated Section 303 of the Act, if that constituted a violation thereof. The Board ruled that no matter what the relationship between Petitioner and Viness or Service had been, nor whether it was defined as agency "in some respects" as the Fifth Circuit stated, it was discontinued not later than August 29, 1955, and that on September 13, 1955, when the boycott whether prohibited or not occurred, that then Service was "another person" and "another employer" within the meaning of the Act. That was sound and substantial thinking for these reasons: (a) since Respondent admitted its object was recognition by and executed union contracts from Petitioner, Respondent could have legally picketed Petitioner in Columbus; and (b) Respondent could have picketed legally in Atlanta by arranging the picketing with the employee drivers of Petitioner and other persons not employed by users of the premises of the Terminal and by arranging for the pickets to carry signs clearly indicating that the picketing and strike was against only Petitioner. But Respondent chose to broaden the pressures on Petitioner by bringing into the picketing and strike the employees of Service. By simple reason and logic, for prohibited boycott determinations, the time for determining the relationship between the two "persons" or the two "employers," to answer the questions as to whether or not one may be "another person" or "another employer", is the date of the act of the Union which might invade the province of illegality. That date was September 13, 1955, when Johnson, representing Respondent, told the employees, as quoted by the Trial Examiner, "to hit the street" and said employees obeyed his direction and order.

### 3. The Decision of the District Court on the Motion of Respondent for Directed Verdict.

The District Court in denying the motion for directed verdict made by Respondent did not rule as a matter of law that Service was not an agent, an ally, an *alter ego*, of Petitioner or because of "enmeshment" in the operations of Petitioner and Service that Service was not a legally neutral employer so far as the dispute between Petitioner and Respondent was concerned. The District Court, although the authorities on those issues seemed strongly against Respondent, left all those questions to be determined by the jury on instructions given in the Charge.

But the District Judge indicated, but not in the presence of the jury, that he strongly believed that a prohibited boycott had been committed by Respondent, and that the evidence thereof was so complete that Petitioner, perhaps, should be granted a directed verdict on the boycott issue, leaving the trial to proceed on the issue of damages alone. At the close of the evidence, Attorneys for Petitioner made the following motion and the District Judge the following ruling:

> "Mr. Swinson: Your Honor, the plaintiff moves for a directed verdict against the defendant on the issue of liability alone, or that the Court instruct the jury to the same effect; that is, that the issue of liability will not be decided by the jury and that only the issue of damages will be submitted.
>
> "That is the motion. In support of that motion—
>
> "The Court: All right, let me say this. Your motion is a challenging motion. It raises some very interesting questions, and I am not cutting you off in argument, but as you say, you and I and Mr. Patton have been working on this case now about two years. We ought to know the law about it, and we ought to know pretty well the facts, and we do, all of us. I

think the wise thing to do is to let the jury pass on that issue and I am going to give it that direction, so I am going to overrule that motion and let's see what the jury does with it.

"Finally, the procedure in the United States Court has become very business like, as we all know. That motion can be considered further if it should be necessary to consider it further by this Court and by the Court of Appeals, so in accordance with the rule I am overruling your motion, reserving to you and for you all of the rights accorded by the rules of federal procedure that that question could be considered further if it is deemed wise to consider it further. Let's see what the jury does." (Record 743).

More will be stated on this subject when Petitioner comes to deal with the decision of the lower Court.

**4. The Decision of the Fifth Circuit.**

(a) The motion by Respondent for directed verdict was made at the close of all the evidence and before the Charge to the jury and appears in the printed Record at 744-748. The motion by Respondent for judgment notwithstanding verdict, of course made after the verdict, appears in the Record at 781-783. The grounds for the two motions are substantially the same: (a) no boycott; and (b) no recoverable damages proven. The "DIRECTIONS" of the lower Court to the District Court were, in substance, first, grant the directed verdict; second, grant the motion notwithstanding verdict; and, third, enter judgment for Respondent. On the face of these "DIRECTIONS," as well as in the basis for the same in the Opinion of the lower Court, there is an illogical departure "from the accepted and usual course of judicial proceedings," which standing alone without other substance to support it may not be sufficient for the "exercise of this court's power of supervision." But this produces the questions: If the District

Court, in substance, is ordered to grant the motion for directed verdict, why is it also, in substance ordered to grant the motion notwithstanding verdict? Was that done as a basis for discussing the Charge to the jury and in order to strengthen a doubtful ruling on the motion for directed verdict? And if the true error lay in the Charge, should not, perhaps, the motion for new trial have been granted? But we respectfully urge that substance will be made to appear below.

(b) The facts relied on by Petitioner and by Respondent are set forth above. The oral agreement between Petitioner and Service, forming the basis for the contention by Petitioner, that Service was an "independent contractor" and hence is "another person" and "another employer," is set forth as Admission "17" (Record 78-79). Admission "17" is in the language both of the Trial Examiner and the Board. With no proof relative to the relationship between Petitioner and Service added to that, isn't it clear that Petitioner had established a *prima facie* case and the right to a jury verdict on the question of the legal relationship between the two? Isn't it also true that the lower Court had no authority in law to order the grant of a directed verdict and to reverse the judgment if the District Judge, without error, instructed the jury as to the law. We respectfully insist that there is no basis in the record or in law authorizing the lower Court to rule that as a matter of law Service was not "another person," or was not "another employer," or was not a "neutral employer" within the meaning of the Act. The Supreme Court of the United States has not yet defined the term "neutral employer," as will be seen from further argument. At least one circuit court has unqualifiedly ruled that the questions indicated should be submitted to the jury for fact determination.

> "In action by shipper against international longshoremen's labor union, local union, and individuals to recover damages for secondary boycott under the Labor-Management Relations Act, question *whether there was a secondary boycott was for jury.*" (Emphasis supplied).
>
> *International Longshoremen's, etc., Union et al.* v. *H. Pineapple Co.*, 226 F.2d 875 (1).

We believe the foregoing demonstrates a "departure" authorizing "supervision" by this Court.

(c) The Fifth Circuit as had the Trial Examiner, the Board, and the District Judge, rejected the contentions of Respondent, that the evidence established that Service was an "ally" or "alter ego" of Petitioner.

(d) But the Fifth Circuit opinion does deal with "agency" and enmeshment between Service and Petitioner and Congressional intention as to Section 303 (a) (1) and (2) in a way which is destructive of precision at least in the opinion of Attorneys for Petitioner. The opinion states:

> "Local 728's first argument in defense was that Service was the 'agent' of Empire. 29 U.S.C.A., §152 (2), provides that 'the term "employer" includes any person acting as an agent of an employer, directly or indirectly. * * *' If Service was the agent of Empire within the meaning of the Act, then Empire could not have been 'any other person' or 'any other employer' within the meaning of Section 303. (Emphasis added.) Certainly, Service was the agent of Empire for some purposes. It was Empire's agent for receiving freight consigned to Empire, for soliciting freight for Empire, for receiving telephone calls for Empire. The pertinent question here is whether Service was Empire's agent with regard to Empire's labor relations with the five over-the-road drivers temporarily stationed in Atlanta." (Emphasis supplied) (Appendix A, p. A29).

"* * * Receiving freight consigned to Empire," * * * "soliciting freight for Empire," and * * * "receiving telephone calls for Empire * * *" are duties which are equally as consistent to a relationship of independent contractor as to one of agency. The tests to determine the two, and the differences between the two, were well known to the lower Court. And while the true test for determining this certiorari is stated by the Fifth Circuit as follows:

> "* * * The pertinent question here is whether Service was Empire's (Petitioner's) agent with regard to Empire's labor relations with the five over-the-road drivers temporarily stationed in Atlanta." (Appendix A, p. A29).

Citing *NLRB* v. *Condenser Corp.*, 128 F.2d 67, 71 (3rd Ct. 1942), the Fifth Circuit misapplied the test.

This was followed in the opinion of the lower Court by quoted testimony, said to be uncontradicted, from Cook, President of Respondent. Petitioner replied by quoting all of the testimony Cook and some of the testimony Viness gave on this point, the following being from a Reply Brief filed by Petitioner with the Fifth Circuit:

> "Furthermore, the testimony of Cook (Rec. 711-734) and Viness, which does appear in the Record, does not show that Cook, as an official of Appellant and as representing employees of Appellee, with Viness as agent of Appellee, adjusted or settled 'grievances' of employees of Appellee. The only testimony delivered by Cook on Direct Examination in that regard appears at pages 712-713 of the Record, and is as follows:
>
> > 'Q. Now, Mr. Cook, did you have any conversations with Mr. Viness, Jack Viness of Service Cartage Company, with reference to any grievances for the five over-the-road truck drivers of Empire State Express?

'A. Yes, sir. During the—I think it's the first part of August or the middle of August, Mr. Mathis was assigned to that company and he was on vacation and the drivers complained to me on run-arounds and also where lessees had been running in their place.

'Q. What is meant by "run-arounds"?

'A. Run-arounds is where a company will dispatch a junior driver out ahead of a senior driver, and I went to Service Cartage Company and Empire State Express on these particular grievances and talked to Mr. Viness, and Mr. Viness called Columbus. We got some of the problems out of the way.

'Q. You say "we", who do you mean?

'A. Mr. Viness and myself, in reference to the lessees running instead of the regular drivers who we represented. He said they would generally run out of Columbus, and he called Columbus himself. It was late in the afternoon or the early evening, probably around six or seven o'clock, and I think he got Mr. Rowlenson on the phone and it was discussed briefly and he advised me at that time that he had a meeting set up with Mr. Mathis whenever he got back into town and he would work it out at that time, whatever the problems were that we were unable. Mr Viness and myself, to settle.'

and the only testimony delivered by Cook on Cross-Examination in that regard appears at pages 723-726 of the Record, and is as follows:

"'Q. Now, Mr. Cook, when was the last time that you looked at your affidavit that you filed, your counsel filed, in the injunction case up in Gainesville dated October 31?

'A. I don't know which one you are talking about, Bob.

'Q. Well suppose you take a look at it.

'A. I signed so many until it's hard to remember (Affidavit handed to witness). You want me to read it?

'Q. No, I just want to know when was the last time you looked at that or read it?

'A. I think I looked at the affidavit this morning.

'Q. Say you looked at it this morning?

'A. Yes, sir.

'Q. Well, then, you probably know that it's got this statement in it. "During the time that ACA Motor Lines had operated this particular freight business, the drivers had been given the runs on the basis of seniority and up until the time the drivers complained to me Empire had been giving the drivers the runs or work on the basis of seniority." And this is the part I am particularly interested in, if you will listen carefully to this: "*I immediately called the main office of the company in Columbus, Georgia, and attempted to straighten the matter out. I talked with a dispatcher in Columbus, Georgia, but was unable to come to any agreement, and this was the first time that either myself or any of the officers of my local union realized there was any question about Empire State Express operating under the terms of the over-the-road contract.*"

'Now you remember that was in here, since you read it this morning and you just had a chance to look at it?

'A. Yes, sir.

'Q. You don't deny that you made that statement under oath in the United States Federal Court for the Northern District of Georgia in October, 1955, do you?

'A. No, sir.

'Q. But you now testify that you went and talked to Mr. Viness about this?

'A. Could I explain that, sir? That is the same—

'Q. Well, I'll give you—

Mr. Patton: 'Your Honor, I think the witness has a right to explain—

Mr. Thompson: 'I want him to fully and completely explain it, Your Honor, but I think I'm entitled to an answer first, and then he can offer his explanation.

The Court: 'That's right. Let him answer the question and then explain it. Let's see, was there a question that was unanswered?

'A. Was the last question, did I testify that I talked with Mr. Viness?

'Q. You are now testifying to that. Is that correct?

'A. Yes, sir, I sure am.

'Q. All right. Now answer one more and then you can give your explanation. You didn't mention Mr. Viness in this affidavit, did you?

'A. No, sir.

'Q. You didn't mention going and talking to Mr. Viness about this, did you, in 1955?

'A. Not in that affidavit, I did not.

'Q. All right, sir, now give the explanation.

'A. This telephone call was made from Empire State's terminal in Atlanta, the telephone call that I mentioned there, and Mr. Viness, if I'm not mistaken made the call, and then give me the telephone to talk to the gentlemen that he got in Savannah and it was made from his office in Atlanta.

Mr. Swinson: 'You said the gentlemen in Savannah, didn't you?

'A. I mean Columbus, excuse me

'You didn't see fit to put that in this affidavit that was filed in the injunction case, did you?

'A. Well, I didn't put it in there at the time the affidavit was made.

'Q. You will agree with me, will you not, Mr. Cook, that you don't know anything else about this dispute other than that factual situation that you have just now related? Would you agree with that? I mean of your own knowledge, of course.

'A. Well, of a fact, I don't. I have common knowledge.

'Q. You know what people have told you and what information you have gotten, but you didn't participate in any of the rest of it other than this one telephone call you are referring to? Is that correct?

'A. No, sir, I did not. I didn't talk to Mr. Rowlenson or Mr. Livingston either one any further.' (Emphasis supplied).

Moreover, Viness testified (Rec. 414-415) as follows:

'Q. What was the first information that you had regarding picketing?

'A. Well—

'Q. Or a strike at the terminal?

'A. Well, Mr. Johnson walked in and introduced himself and told me he was the representative of the Local 728.

'Q. What date?

'A. That was on the 23rd, I believe. I mean on the 13th.

'Q. September 13th?

'A. Yes.

'Q. Is that the day the picketing began?

'A. The day the picketing began and it was about eight o'clock or a quarter of eight and he said at ten-thirty, he was going to strike me. I asked him why he was going to strike me and he said because I represented Empire State Express *and I told him I had nothing to do with Empire's labor disputes* and he said, well, nevertheless, at 10:30 we are going to strike you. It turned out that he struck me at ten o'clock instead of ten-thirty.' (Emphasis

supplied)." (Record Cook pp. 712-713 and 723-726; Viness pp. 414-415).

Compare the foregoing with what is quoted in the Opinion and note that Mathis "was assigned to that company" (Petitioner); visited Service if he visited Service at all that one time only; explained that he simply meant that Viness (only according to Cook's recollection) put in the call and Cook talked to a representative of Petitioner in Columbus; and especially note that Cook made a prior conflicting statement in the Board injunction case in the Northern District of Georgia. Now, if Cook, President, or Mathis, Secretary-Treasurer, of Respondent ever settled one single labor grievance or labor dispute, with Viness acting with the authority of an agent to do so, the evidence of such an occurrence is not in this record. But there is more to be added. Respondent on August 1, 1955, became the bargaining representative for the local drivers and other employees of Service, and this was arranged with Service and not Petitioner. Afterward Respondent in that regard dealt with Service. When Respondent sought representation of the employees of Petitioner, Respondent never at any time attempted to do so through Viness. Mathis not only wrote letters to Columbus demanding recognition: he visited Columbus (without consulting Viness so far as the record shows) and conferred with Livingston, Rowlenson and Swinson, the Attorney of Respondent, on August 29, 1955, and there demanded recognition and executed contracts. Overlooking pertinent testimony is not a "departure", but careless interpretation of testimony on the most vital point in a case could well be. And this was most vital; for Petitioner at all times in this action has admitted that if Petitioner could not establish by the preponderance of proven facts that Service was not an "ally", was not an "alter ego", was not an "agent" and

especially an "agent" authorized to act in labor relations. and was not even a "neutral employer", within the proper definition of such term, that Petitioner should and ought not to recover.

The opinion of the lower Court attempted to make it appear that exactly the same situation existed after August 1, 1955, when Petitioner commenced business and continued up to and through September 13, 1955, as existed prior to July 31, 1955, when ACA conducted the business: thus blanking out and ignoring the contract and relationship between Service and Petitioner. Then the opinion states:

> "ACA was split in two. The over-the-road drivers were now technically the employees of Empire, while the local employees worked for Service Cartage Company. The economic fortunes of the two companies were as inextricably interwoven as they were when both entities were ACA and Mr. Viness of Service still retained general supervision of the over-the-road drivers of Empire.
>
> "This latter fact is important not so much to show that Viness was technically the 'agent' of Empire, as to illustrate the close relationship between the two companies. In supervising these drivers, Viness was exercising a management functon of Empire. He ceased to exercise that function only when there were no longer any drivers to supervise, and not because he was disinclined to serve as supervisor, nor because Empire wished that he no longer do so. Insofar as Empire and Service were concerned, they were satisfied to have Viness continue as he had. Empire would argue to the contrary, pointing out that Viness' authority to dispatch these drivers was expressly revoked. This revocation, however, came after the over-the-road drivers refused to drive, when there was no one for Viness to supervise. And once the strike began, and it began when the drivers refused to drive, the employer could not make a change in form which would

> deprive the strikers of the right to call on their fellow drivers to support their action." (Appendix A, pp. A16-A17).

Did ACA contain two "entities"? No, the evidence showed ACA conducted its own cartage and all ACA employees were members of Respondent, and ACA recognized and dealt with Respondent. Did not the lower Court know that Viness did not work for ACA prior to August 1, 1955, and never worked for ACA, and that Service was a partnership, which hired and paid its own employees, and which did recognize Respondent (while Petitioner did not) as bargaining representative of Service employees? Then, if the Fifth Circuit knew those facts, what evidence or reason supports this statement of the opinion:

> "* * * The economic fortunes of the two companies were as inextricably interwoven as they were when both *entities* were ACA and Mr. Viness of Service *still retained* general supervision of the over-the-road drivers of Empire." (Emphasis supplied).

Next following in the quote from the Opinion, the lower Court seems to admit that the picture that ACA equals Petitioner plus Service does not have support in the evidence to prove "that Viness was technically the 'agent' of Empire * * *" and retreats to the position of "the close relationship between the two companies," thus completing the circle where the NLRB Trial Examiner first chose ground and made battle.

Next in the quote from the Opinion and to the end of the quote, except for the first sentence, reading: "In supervising these drivers, Viness was exercising a management function of Empire," there follow five sentences each completely based on assumptions not warranted or justified by evidence; and the last sentence contains reliance on the unsound principle that a legal strike for a legal

purpose (without regard to the true situs of the dispute being in Columbus, Georgia), may not be converted into an illegal strike by ordering to the picket lines later the employees of another "person" or "employer." Those five sentences of the Opinion ignored the fact that the drivers were to continue to reside in, and be dispatched from Atlanta by Viness temporarily; they ignored the contents of the following letter written on stationary headed "Empire State Express, Inc., P. O. Box 1559, Columbus, Georgia" by Rowlenson, Vice President of Petitioner on July 29, 1955 (before Petitioner began business), and addressed to the five drivers:

"July 29, 1955.

Messrs. Benefield, Boyd, Cook, Creel and Williams,
ACA Motor Lines, Inc.,
Atlanta, Ga.

Gentlemen:

Empire State Express, Inc., will take over and operate the rights owned by ACA Motor Lines, Inc. This is effective Monday, August 1, 1955.

It is our desire to have you to continue to drive and work for us in the future as you have for ACA in the past.

We are moving our executive offices and headquarters from Atlanta to Columbus and, as you are able to conveniently arrange to do so, it will be necessary for you to live in Columbus. All operations and procedures will emanate from Columbus and moving here will be necessary.

We look forward to working with each of you for our mutual benefit.

Yours very truly,

EMPIRE STATE EXPRESS, INC.

W. H. Rowlenson
Vice President

whr s

cc—Teamster's Union, Atlanta, Ga."

which letter was introduced without objection from Respondent, and Viness testified he exhibited the letter to each of the five drivers and each read it; it ignores that it was the choice and preference of Petitioner from August 1, 1955, on for its drivers to reside in Columbus and to dispatch from Columbus; and it ignores that the arrangement made with Viness (and not included in the contract between Petitioner and Service) was for the temporary accomodation of the drivers and not because Petitioner wished the situation to begin with or to continue. Since the Fifth Circuit has so freely dealt in assumption, may Attorneys for Petitioner, who did not argue this to the District Court, the jury or to the Fifth Circuit, and even now do not desire to influence this Court with its assertion: isn't it just possible that the drivers, who admittedly were drinking on August 26, 1955, and who refused to drive the tractors of Petitioner, did so for the real and secret reason that they individually, and Respondent also, had made up their minds for the drivers not to move to Columbus, but to force Petitioner into a contract which would permit them to continue to live in Atlanta?

This brings us to the last sentence of the Opinion quoted above. Petitioner did not enter this suit on the basis of any strike which began on August 26, 1955. It

sued on the picketing and on the strike that Respondent caused the employees of Service to engage in on September 13, 1955, the date on which a prohibited boycott was first committed, if any at all was committed. That is the date, called the "appraisal date" by the Board, from which and afterward the relationship of Petitioner and Service should be tested for boycott or no-boycott determination.

We turn now to what is said in the Opinion relative to "the intent of the Statute." There is no use rehashing before this Court, which recently decided Local 761 *Electrical Workers* v. *NLRB*, 29 LW 4480 (1961), 6 L. Ed. 2d, Adv. Sheet No. [redacted], what was said or not said by Taft or other Senators or Congressmen, and anything on the subject that all boycotts are not prohibited by this Statute. We accept that conclusion, because it is obvious from the statute itself and sound. We also accept, because this Court has said so and, too, because it is sound, that a "literal construction of the statute" would ban boycotts not intended to be condemned by the statute. But since this Court in *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 71 S. Ct. 961, 95 L. Ed. 1277, and in *Local 761 Electrical Workers* v. *NLRB*, *supra*, used the terms "neutral employer" and "neutrality" but so far as Attorneys for Petitioner know has not yet defined said terms, we must argue without guidance from this Court what such terms mean in law as applied to this case. We begin, of course, with the premise that in such a legal area no all-embracing guide can be announced, and each case must be decided somewhat if not altogether on its own facts circumstances and most important of all the particular relationships therein existing. Below, we take the position that this is one of the reasons this Court should grant to Petitioner relief on this petition, on the ground that this is an important federal question which should be decided

It is the contention of Petitioner that when it is necessary to decide a question of the relationship of two or more "persons" or two or more "employers," under Section 303 or Section 8 (b) of the Act, to determine "neutrality" or "enmeshment," it should be approached from the standpoint of a true interest or lack of a true interest in the labor dispute, picketing and strike (and the independence of the two in this respect) rather than an approach founded upon a concept of a common business interest, such as a "common venture" or a "common" effort together to carry out some enterprise. Such an approach would be broad enough to protect the unions under the doctrines of "ally," "alter ego," "agency" within the meaning of the Act, and "enmeshment" of employers where "enmeshment" was involved in the labor dispute; it would be broad enough, generally, to cover the "common situs" and "separate gate" cases; and it would leave room for the continued development of the Board to meet the new complexities which no doubt will be presented. It would leave the Board and the courts free to effectuate what has been described as "the dual objectives of Congress—the elimination of" prohibited "secondary boycotts and the protection of" true "primary activity."

And it should be recognized that this case presents a "common situs" situation of a kind, where the premises were used for receipts and deliveries by Petitioner, for all the cartage activities of Service and by the three other carriers named herein; and recalled that the sign the pickets carried published a strike only against Petitioner, as to which the Board said:

> "In developing and applying these standards, the controlling consideration has been to require that the picketing be so conducted as to minimize its impact on neutral employees insofar as this can be done with-

out substantial impairment of the effectiveness of the picketing in reaching the primary employees."
*Crystal Palace Market*, 116 NLRB 856.

Certainly a proper picket sign could have been used, confining the strike to Petitioner only; and it must not be forgotten that there were no other "primary employees" of Petitioner to be reached at the situs of the Atlanta Terminal, but Respondent could legally have picketed Petitioner at Columbus and reached the other employees of Petitioner in Columbus and done so at the proper situs of the labor dispute.

Moreover, Respondent took two positions before the District Court and the Fifth Circuit which we regard as unsound and which we believe this Court will reject: (1) That Respondent did not know of the change in dispatching from Atlanta to Columbus from August 29, 1955, and before September 13, 1955, and thereafter and thought Viness still had the same duties after August 29. That is an absurd position, for it was apparent to the drivers and to Respondent that the other and all drivers after August 29 were working out of Columbus and not Atlanta. (2) The second position was that Petitioner had no right to make a change by revoking the arrangement with Viness to dispatch in Atlanta and such revocation was invalid until notice was given Respondent, which was not done prior to September 13. In this position the Fifth Circuit joined, by stating in the Opinion: "Empire would argue to the contrary, pointing out that Viness' authority to dispatch these drivers was expressly revoked. This revocation, however, came after the over-the-road drivers refused to drive, when there was no one for Viness to supervise." This argument is ridiculous. The revocation was not made to trick or to deceive Respondent. It was not made to induce or lead Respondent into a secondary boycott. At the time the revo-

cation was made, Respondent had not been recognized as the bargaining representative of any of the employees of Petitioner—so just what duty did Petitioner owe to the drivers or to Respondent which deterred it from making the revocation?

**4. (a) The Authorities Cited to and Before the Fifth Circuit.**

The Board decision, 116 NLRB 615, was cited on "the situs of the labor dispute," Columbus rather than Atlanta, an "expertise" matter.

The decision of the Trial Examiner and of the Board, as well as the cases cited below, were cited as establishing that the proof did not justify the application of the "ally" or struck work doctrine, or the "alter ego" or control doctrine, or the "agency" principle.

*Douds* v. *Metropolitan Federation,* 75 F. Supp. 672.
*International Electrical Workers Local 501* v. *NLRB*, 181 F.2d 34, 37.

and all cases cited by the Trial Examiner and the Board.

The footnote of Judge James Alger Fee of the United States District Court, District of Oregon, in *Curto* v. *Longshoremen's and Warehousemen's Union C.I.O.*, 107 F. Supp. 805, footnote 15, pages 815, 816, and the cases therein cited, were cited and quoted to the Fifth Circuit on the ground that the "ally" and "alter ego" doctrines were not applicable, as well as

50 Michigan Law Review 318.

The case of *NLRB* v. *Wine, etc., & Distillery Workers Union*, 2 Cir., 178 F.2d 584, 16 A.L.R.2d 762 and 2 Labor Law Journal 737, were cited as narrowing the test announced in *Douds* v. *Metropolitan Federation*, 75 Supp. 672.

As showing the issue of "secondary boycott" was factual and for the jury and for other purposes, Petitioner cited

*International Long. & Warehouse. Union C.I.O.* v. *H. Pineapple Co.*, 226 F.2d 875 (1) and opinion.

All cases cited by the Trial Examiner and by the Board in their decisions, were cited on the "secondary boycott" issue.

We consider it necessary to quote only the following from Judge Fee's footnote:

> "*The Supreme Court has not yet ruled on this doctrine nor attempted delineation* (neutrality). National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665, 669, 71 S. Ct. 961, 95 L. Ed. 1277, by way of dictum, mentions the term 'neutral' but makes no attempt to define it.
>
> "The cases which have considered this doctrine have used it quite sparingly. Thus far, the National Labor Relations Board has denied protection on the ground of non-neutrality only in cases like the Irwin-Lyons case, 87 N.L.R.B., No. 9, where the primary and and secondary enterprises were under the same ownership and control and engaged in integrated operations; i. e., substantially the same enterprise. See 64 Harvard Law Review 802, 2 Labor Law Journal 268. In practically all the cases in which non-neutrality has been urged, the National Labor Relations Board has found neutrality. The business relationship between a contractor and subcontractor in the construction industry will not cause non-neutrality. Gould and Preisner, 82 N.L.R.B. 1195. The Supreme Court apparently follows this view. See National Labor Relations Board v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1277. Likewise, the National Labor Relations Board reached the same result concerning relationships between a

contractor and his subcontractors in other industries, Climax Machinery Co. 36 N.L.R.B. 1243, between a liquor distiller and his wholesale distributors, Schenley Distillers Corp., 78 N.L.R.B. 504, and between a manufacturer of prefabricated houses and the builder who purchases and erects them for sale, Wadsworth Building Co., 81 N.L.R.B. 802.

"The leading district court opinion finding non-neutrality is that of the Southern District of New York, by Judge Rifkind, in Douds v. Metropolitan Federation of Architects, D.C., 75 F. Supp. 672, which held that, when a struck manufacturer subcontracts his work to his own subsidiary and sends his own foremen to supervise the subcontractor's employees, picketing the subcontractor may not be illegal since the parties may not be 'doing business' with each other within the meaning of the act. See 50 Michigan Law Review 318. The Court of Appeals for the Second Circuit apparently is not too fond of this rationale, for it has narrowed Judge Rifkind's test down to identity of ownership and management and in most cases found neutrality. See National Labor Relations Board v. Wine, Liquor v. Distillery Workers Union, 2 Cir., 178 F.2d 584, 16 A.L.R. 2d 762; 2 Labor Law Journal 737.

"In discussing this issue, Judge Learned Hand, in International Brotherhood of Electrical Workers, Local 501 v. National Labor Relations Board, 2 Cir., 181 F.2d 34, 37, said: 'In short, is a secondary boycott limited to pressure upon third parties who are not engaged in the same venture with the unyielding employer? We can see no basis for such a distinction. The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands. We cannot see why it should make any difference that the

third person is engaged in a common venture with the employer, or whether he is dealing with him independently. The phrase, 'doing business,' would ordinarily cover doing any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with him to perform part of a work which the third party has himself contracted to do.'

"Hence there is considerable doubt that the 'ally doctrine' imposes a real limitation on §8(b) (4) (A). The test seems to boil down to—are the two enterprises the same? If they are, then the terms of the statute 'doing business with any other person' are not met. In the instant case, Castle and Cook, Isleways, and Hawaiian Pineapple Company are different enterprises and the terms of the statute are fulfilled."

*Curto* v. *International Longshoreman's & Warehousemen's Union CIO*, and two other cases, 107 F. Supp. 805, footnote 15, pages 815, 816.

Also, on the boycott issue, Petitioner cited with same confidence, the decision by Chief Judge L. Hand, holding:

"In short, is a secondary boycott limited to pressure upon third parties who are not engaged in the same venture with the unyielding employer? We can see no basis for such a distinction. The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands. *We cannot see why it should make any difference that the third person is engaged in a common venture with the employer, or whether he is dealing with him independently.* The phrase, 'doing business,' would ordinarily cover doing any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with

him to perform part of a work which the third party has himself contracted to do. The third party cooperates as truly with one to whom he furnishes materials as with a subcontractor. *Indeed, when the coercion is upon the third person to break a contract with the employer, his position is more embarrassing than if he may discontinue his relations with the employer without danger of liability. The phrase, 'cease doing business,' is general and admits of no such evasion.*" (Emphasis supplied).

*International Brotherhood of Electrical Workers, Local 501 et al. v. National Labor Relations Board*, 181 F.2d 34, Opinion 37.

In the opinion in *Electrical Workers Local 501 v. N.L.R.B., supra*, Judge Hand laid down the essentials of a sensible path to form a guide. What that distinguished jurist has said is that (in cases where the agency, ally and *alter ego* doctrines are not applicable), in "common situs," in "separate gate" and in other cases where it is necessary to determine the "neutrality" of one of the "persons" or "employers," the test should not be based on "a common venture," undertaking or enterprise, but should be based on the concept of actual interest in the labor dispute, strike and picketing by both employers. If the secondary employer is not actually interested in the picketing, then he is a neutral; if he is so interested, then he is not a neutral, and no boycott is committed. See *NLRB v. Condenser Corp.*, 3d Cir., 128 F.2d 67.

About the only decision cited by Respondent, which was somewhat difficult for Petitioner to distinguish was *Local 24 Teamsters v. NLRB*, 266 F.2d 675, U.S. Ct. Apps. District of Columbia, from which opinion the Fifth Circuit quoted at length. That case involved claimed "enmeshment" of employers; and that U. S. Court of Appeals frankly stated it was extremely difficult to unravel the

enmeshment of employers. The secondary trucking employer, Ace, in that case conducted trucking operations through three methods: (1) regular employee drivers; (2) individual independent contract drivers owning their own tractors but largely directed and given orders to perform their work in the same manner as regular employee drivers; and (3) leased independent contract drivers where the lessor independent contractor hired drivers who hauled freight for Ace under orders from Ace as stated for the individual independent contractor drivers. "Thereupon Local 24 requested recognition from the lessor owners and sought agreements from them" for a union contract. "All the owners refused to meet these demands. Thereupon the drivers (lessor-owners) struck. In the course of the strike, they picketed the Ace terminals at various cities, and * * * directly induced employees of Ace to honor the picket line and refrain from working." The Court held that (disregarding "co-employer," "independent contractor" and "ally"), the control of the lessor-owners and of Ace were so "intertwined" that the two amounted to a single employer and Ace was not a neutral. While the ruling is apparently sound in that case, it is the sort of rule which should be only applied in cases of like kind. If the rule is mushily or imprecisely applied, it would destroy some of the essential of Sections 303 and 8(b) (4) (A) and (B) of the Act.

And that decision, *Local 24 of Teamsters* v. *NLRB*, *supra*, is receiving such treatment by other courts. See *U. Mine Workers* v. *Osborne Mining Co.*, 6th Cir., 279 F.2d 716, where the Sixth Circuit after quoting from *Local 24* v. *NLRB*, holds:

> "In the case at bar the strands of control referred to in the Teamsters case were not present, and the evidence supports the findings of the trial judge as to

the existence of the independent contractor relationship."

*U. M. Workers* v. *Osborne Mining Co., supra.*

Petitioner cannot claim credit for bringing to the attention of the Fifth Circuit the decision of this Court in *Local 761* v. *NLRB*, 6 L. Ed. 2d Adv. Sheet, Vol. No. 4, 592, in which Justice Frankfurter delivered the opinion on May 29, 1961; for the decision did not come to the attention of Attorneys for Petitioner until after all briefs had been filed in this case. *But nevertheless, that decision did receive attention by the Fifth Circuit because that Court cited it in footnote 8a as authority* in criticism of the Charge to the jury, on the difficulty of explaining what is meant in the statute by the terms "any other person" and "any other employer", saying: "This is an area where precise delineation is extremely difficult." True! But the Fifth Circuit did not mention the fact that this Court (and as this Court said the Board) had faced and not ignored the responsibility because it was "difficult"; and more important, the Fifth Circuit did not go to the trouble to apply so much of that decision to this case as may have been applicable, or to rule that none of that decision was applicable hereto if that Court so thought.

*Local 761* v. *NLRB, supra*, is not controlling of all the questions here. As a matter of fact, until this Attorney for Petitioner read the decision, he was of opinion that Sections 303 and 8(b) could be "literally construed" without harm to employers and unions. Said Attorney was of opinion, and so argued, that except in the instances of a specific such as the doctrine of "agency" within the meaning of the Act, and in recognized instances of "looking through form to substance", such as the "ally" and "alter ego" and control doctrines, the terms "neutral person" or "employer" should be limited rigidly to a convenient means

of expressing the terms "any other person" or "any other employer". We think differently now, because of what we have been made to see by the thorough history of the development of Board and Court decisions. .

But *Local 761* v. *NLRB, supra*, does clearly establish two rules applicable to this case, and in that the Fifth Circuit did not apply those two rules in its decision in this case, the decision of the lower Court is in conflct therewith. First, this Court certainly laid down the positive rule that a *bona fide* "independent contractor" (who or which may be engaged in a common venture with a primary employer) is or may be "any other person" or "any other employer", or to use, as this Court did, the other term a "neutral employer". Second, this Court clearly set forth proper guides in "common situs" cases, and regarding signs carried by pickets clearly indicating the employer and excluding other employers against whom the strike was directed. We know this did not end the problem of the Fifth Circuit: it was still faced with the problem of determining whether Service was a true neutral. And here again, with respect, we pause to assert that we think and believe that the duty of this Court is not ended. Do not the federal courts of this country, and the Board, need from this Court a guide for the future as to the extreme to which the term "neutral" may be applied to both "employers" and "employees"? This problem is not removed by the amendments to the LMRA made since this action arose. Said amendments not only are not involved here: they only make it more important that this Court define "neutral" to limits as far as this Court thinks it wise to be explicit within this area.

And we with equal sincerity contend that the Fifth Circuit accepted trivia and trivial factors and strained even those small considerations to reach the judgment and

conclusion that Service was not a "neutral employer." The testimony, the evidence, and the circumstances were preponderantly the other way.

### 5. The Treatment by the Fifth Circuit of the Charge to the Jury.

As indicated if not stated above, we do not think, if the Fifth Circuit is correct in the ruling that the District Judge should have granted the motion of Respondent for directed verdict, that a single reference to the Charge to the jury, was appropriate. But a great deal of the Charge is quoted in the opinion, and we are furnishing as an Appendix to this petition all except the formal parts of the Charge.

Petitioner will discuss only one phase of the Charge to the jury and in the opinion of Petitioner, an abortive and null exception thereto made by Attorneys for Respondent. The jury was instructed as follows:

> "Insofar as the terms 'agent, agency, neutral, neutrality, ally, alter ego' and 'independent contractor', are concerned the test boils down to this: are the two enterprises the same? If they are the same then the terms of the statute 'any other person' in the phrase 'to cease doing business with any other person' and the terms 'any other employer' in the phrase 'forcing or requiring any other employer to recognize or bargain with a labor organization' are not met. That is, if the two enterprises are the same.
>
> "If the two enterprises, however, are not the same then these particular terms of these statutes are met."

To that instruction, Attorneys for Respondent attempted to except and realizing the exception might not apprise the court of the specific charge excepted to, corrected the same as follows:

> "Mr. Patton: If Your Honor please, if I might address the Court again. I think perhaps I stated my last point a little clumsily. I would like to state it again.
>
> "I think I said the parties were agents. What I intended was an agency relationship, so I would like to state that again. I object to the Court's charging the jury that they would first have to find that the two companies were one and the same before they could find that there was an agency relationship." (R. 778, 780).

The District Judge denied the exception.

In the Fifth Circuit, questions were asked of Attorneys for Petitioner if the use of the question "* * * are the two enterprises the same?" and the later references to the two being "the same" or "not being the same" was error. The Fifth Circuit permitted the filing of a Supplemental Brief by Petitioner, and in that Brief Petitioner made three replies: (1) that Attorneys for Respondent had contended that Service and Petitioner were "one and the same carrier" and hence one employer, by taking that position in the motion by Respondent for directed verdict (before the Judge delivered his Charge), the same appearing in said motion in the following language:

> * * * "That Empire * * * and Service * * * were allies, alter egos, and that they were so intertwined and interrelated as to, in law, be one and the same carrier for the purposes of the NLRA * * *." (Record 744):

(2) that the language of the exception did not fairly apprise the Judge of the matter objected to; and (3) that the whole charge fairly construed corrected the very slight error, if error it was. While we very positively feel that the jury was not misled by the language employed by

the District Judge, because the language was simple and more understandable to the jury than a more technical expression would have been, nevertheless the Fifth Circuit without holding specifically the instruction was error, makes this statement in the Opinion:

> "* * * Yet, we think the jury must have been mislead 'thereby' when it (the jury) was told that the defense was grounded in the fact that Service and Empire were the same."

The Charge to the jury, in the opinion of Attorneys for Petitioner, contained no reversible error, but if the use of the terms the "two enterprises were" or "were not the same" constitutes error, and was not corrected by other portions of the Charge,--then should not the Fifth Circuit have granted a new trial rather than to have said, as it did, that Petitioner had no action or rights at all?

## VIII. ADDITIONAL STATEMENT ON REASONS FOR GRANTING THE WRIT.

We respectfully believe that we have demonstrated that this Court should grant the writ on conflict of decisions with this Court and other courts, and with decisions of the Board approved by this Court in *Local 761 Electrical Workers* v. *NLRB*, 6 L. Ed. 2d Adv. Sh. No. 4, 592 *et seq.* and in other decisions of this Court.

We also are citing the following boycott decisions by the Fifth Circuit:

*NLRB* v. *Local 47 Teamsters*, 5th Cir., 234 F.2d 296 (1956);

*Smith Lbr. Co.* v. *NLRB*, 5th Cir., 246 F.2d 129 (1957);

*Local 450 Engineers* v. *Elliott*, 5th Cir., 256 F.2d 630 (1958);

*Superior Derrick Corp.* v. *NLRB*, 5th Cir., 273 F.2d 891;

*NLRB* v. *Teamsters Local 728*, 5th Cir., 228 F.2d 791 (1956).

Two of the Judges who participated in the decision by the lower Court in this case also presided in *Superior Derrick Corp.* v. *NLRB*, *supra*. And Local 728 Respondent herein was a party to *NLRB* v. *Teamsters Local 728*, *supra*, and R. C. Cook, who has been President of Respondent for some years and who testified in the District Court in this case, was also a party thereto.

We also think that this petition for certiorari sufficiently, and without further elaboration supports the contention of Petitioner that this Court, in justice, should exercise its "power of supervision," to correct a palpable wrong.

The importance of granting the writ to the future progress or development of the judicial system of the United States and of boards charged with administrative law needs only brief elaboration. We believe it is truthfully asserted that this Court has not defined the term "neutral employer" or the term "neutrality" as used in prohibited boycott cases; and we respectfully urge that this Court thoroughly consider the benefit which might enure to the Courts of Appeal of the United States and to the National Labor Relations Board if you should grant this writ and define said terms as precisely as may be done for future application.

Petitioner was a small financial unit; it contended it was compelled to sell its franchises because of the acts of Respondent; it no longer is in operation (the Record shows

all this); but in this petition and in these statements it does not ask for the law to be changed or curved for its benefit or enrichment. Petitioner requests only that this Court give thoughtful consideration to the presented issues of fact and law. If then you feel it to be your duty to tell Petitioner it has been wrong since the beginning: SO BE IT!

## IX. CONCLUSION.

It has been said that a petition for certiorari is but a slender reed, but it also is true that sometimes four or more read, see, realize and act; and where their act is just and right there is displayed for all to see the dignity, the power and the grandeur of the Judicial Branch of our Government.

This 19th day of September, 1961.

Respectfully submitted,

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## APPENDIX "A".

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 18582

**Decision and Judgment of Lower Court in Fifth Circuit Dated July 7, 1961.**

Before RIVES, BROWN and WISDOM, Circuit Judges.

RIVES, Circuit Judge: This is a suit under Section 303 of the National Labor Relations Act, 29 U.S.C.A. Sec. 187. That statute gives a cause of action for damages to a party injured by a "secondary boycott", described in the same language as that employed in Section 8 (b) (4) of the Act, 29 U.S.C.A. Section 158 (b) (4),[1] which declares the "secondary boycott" an unfair labor practice. Section 303 provides in part:

> "(a) It shall be unlawful * * * for any labor organization * * * to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is—
>
> "(1) forcing * * * any employer * * * to cease using, selling, handling, transporting * * * or to cease doing business with any other person;
>
> "(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees * * *."

---

1. Subsequent to the initiation of this litigation, Secs. 8 (b)(4) and 303 were amended by the Landrum-Griffin Act, Sept. 14, 1959, Pub. L. 86-257, 73 Stat. 525, 542, 545.

It was alleged that Local 728 induced the employees of the Service Cartage Company to strike, the object being to force Service to cease doing business with Empire State Express, Inc., and/or to force Empire to recognize Local 728.

The undisputed facts out of which this controversy grew are these. Prior to August 1, 1955, there existed in the State of Georgia an over-the-road truck line known as ACA Motor Lines, Inc. (hereinafter referred to as ACA). ACA's territory embraced a number of communities south and southwest of Atlanta, its northern terminus and its headquarters. In Atlanta, ACA collected freight from local shippers and distributed to local consignees itself. In the terminology of the trade, ACA performed its own cartage work. This freight was brought to ACA's terminal and loaded in its trailers for shipment south to the communities it serviced.

ACA went out of business and sold its franchise and some of its equipment to Empire, which began operations on August 1, 1955. The owners of Empire, Rowlenson and Livingston, decided not to have their company engage in cartage operations in Atlanta. Instead, they entered into a contract with Service Cartage Company, a partnership composed of Viness and Busby, whereby Service agreed to handle the collection and delivery of Empire's freight in Atlanta. Under this agreement, Service was, inter alia, to maintain a terminal in Atlanta to serve as a collection and distribution center for freight carried by Empire. All of Service's employees were former employees of ACA for whom they had performed similar services. Thus, it could be said that Empire succeeded to ACA's over-the-road operations, and Service to ACA's local cartage operations in Atlanta.

Empire decided to base its operations in Columbus, Georgia. This gave rise to the problem of what to do about five over-the-road drivers domiciled in Atlanta who were former employees of ACA. Empire's owners wanted these drivers to move to Columbus as soon as possible. In the meantime, they were to work out of Atlanta driving Empire's trucks south. While based in Atlanta, these drivers were to be dispatched by Mr. Viness of Service.

On August 26, 1955, these five drivers refused to drive the trucks from the Atlanta terminal because they claimed the equipment was unsafe.[2] The following day Empire sent other employees from Columbus to Atlanta to move the trucks. The five over-the-road drivers never returned to work, although they appeared at the Atlanta terminal from time to time. They were never given notice of discharge and nobody was hired to replace them.

The five over-the-road drivers were members of Local 728. On July 28, 1955, prior to Empire's commencing operations, an official of the Local had contacted Empire requesting that Empire recognize 728 as the exclusive bargaining representative for these five drivers.[3] The issue was discussed but not resolved at that time. On August 29, an official of Local 728 again contacted Empire in regard to signing a contract recognizing the Local as the exclusive bargaining agent for the five Atlanta-based drivers. Empire replied that it had no over-the-road drivers belonging to Local 728, "because of what took place" on August 26. "(T)hey refused to work and * * *

---

2. On August 23, the trucks had been removed to Columbus for inspection and repairs following a complaint to the ICC that the equipment was defective.

3. ACA had adhered to the Southeastern Area Over-The-Road Motor Freight Agreement, though it was not a party to a collective bargaining agreement with Local 728.

any time anyone refused to work and operate and do that which they were told to do, they automatically quit and left our employ."[4] On September 9 or 10th, Empire made

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4. This latter statement, a reiteration of his earlier position, was made by Rowlenson on the day the picketing commenced (September 13, 1955). Empire's view that the drivers were no longer "employees" of Empire following their concerted refusal to drive the trucks on August 26 seems to reflect an erroneous view of the law. Section 101(3) of the Taft-Hartley Act, 29 U.S.C.A., Sec. 152 (3), provides that: "The term 'employee' shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * * and who has not obtained any other regular and substantially equivalent employment * * *." "The term 'labor dispute' includes any controversy concerning the terms or conditions of employment * * *." 29 U.S.C.A. 113(c). See *N.L.R.B.* v. *Good Coal Co.*, 6 Cir., 1940, 110 F.2d 501. The physical condition of the trucks which they were to drive would seem to have been a "condition of employment" of the drivers over which there could be a labor dispute within the meaning of the Taft-Hartley Amendments. If this view is accepted, the over-the-road drivers would appear to have been "employees" of Empire within the meaning of the Act until they obtained "regular and substantially equivalent employment."

The District Court in the case at bar charged the jury in accordance with the foregoing analysis.

> "In that connection I charge that if you find that the five drivers of Empire State Express who worked out of the terminal of Service Cartage Company in Atlanta ceased to work as a consequence of, or in connection with, any current labor dispute and had not obtained any other regular and substantially equivalent employment at the time the picketing began on September 13, 1955, said drivers were, on said date, employees of the plaintiff, Empire State Express, Inc.
>
> "And I charge you further that if two or more employees ceased work because of a dispute over working conditions in their employment such employees ceased work because of a current labor dispute and, therefore, if you find that the five over-the-road truck drivers ceased work because of dispute over the condition of the equipment they were required to drive, you will find that they ceased work over a labor dispute."

explicit its refusal to recognize Local 728.[5] On September 13, Local 728 established a picket line at the Atlanta terminal. The pickets carried signs stating that the Local was on strike against Empire State Express.[6] As the picketing began, a representative of Local 728 told the employees of Service to go out on strike, which they did.

Out of these facts the present suit arose. Plaintiff complained, as noted above, that Local 728 induced the employees of Service to strike, the object being to force Service to cease doing business with Empire and/or to force Empire to recognize the union.

Local 728's principal defense was that Empire did not occupy the status of "any other person" within the meaning of Section 303 (a) (1), and Service was not "any other employer" within the meaning of Section 303 (a) (2). It relied in the main on the following facts.

The telephone in the Atlanta terminal, though paid for by Service, was listed in the name of Empire. There was no Atlanta telephone listing for Service. The phone was on a number of occasions answered "Empire State Express." One of the local drivers testified that, "when I

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5. No. 26 of the "Admissions Made by Defendant in the Pleadings" reads:

> "At all times material to this action, Defendant Local Union has demanded of Empire State Express, Inc., that it recognize Defendant Local Union as collective bargaining representative of the employees of Empire State Express, Inc., and that it was not until about September 9 or 10, 1955, that Empire State Express, Inc., refused to recognize Defendant Local Union as collective bargaining agent of the employees of Empire."

6. The business agent testified on the purpose of the picketing as follows:

> "A. It was to—our attempt to force the company to recognize us and reinstate these people on the job, yes."

walk in the building (of a prospective shipper) I say, 'Have you got anything for Empire State Express.' " There were no signs on the terminal indicating that it was the terminal of either Service or Empire. Both Empire and Service distributed to shippers printed circulars which advertised the Atlanta terminal as that of Empire and made no mention of Service. Practically all the freight handled by Service was for the account of Empire.[7] Service owned five trucks (three tractors and two van-type trucks). In addition, it used one van-type truck owned by Empire, which was loaned to Service without charge. None of these six trucks bore an inscription which would indicate their owner or operator. At times, however, Service's tractors hauled trailers which bore Empire's name. All freight payments went directly to Empire, and Empire paid Service at the rate of 25 cents per hundred weight for all freight handled by it. The five over-the-road drivers of Empire domiciled in Atlanta received their instructions from Jack Viness, co-owner of Service, from August 1 until they struck on August 26. The log books and time records of these drivers were delivered to Viness who mailed them to Columbus, and the checks for these drivers were mailed from Columbus to Viness, who distributed them at the Atlanta terminal. Finally, there was uncontradicted testimony that Viness had some authority as to the settlement of grievances relating to the five over-the-road drivers.[8]

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7. Empire admitted that "Service Cartage Company handled only a very small amount of incoming or outgoing freight for any other carrier besides Empire State Express, Inc., from August 1 to September 13, 1955, and that said freight handled was almost negligible."

8. See text following the reference to footnote 11, *infra*.

The District Court charged the jury that:

"It contends, however, that Empire and Service are not separate companies. In addition to the defendant's contentions as I read to you from its answer in this case, it contends that Empire and Service were one company, or in effect one company, or substantially the same company; that Service is part and parcel of Empire; that Service is actually an arm of Empire, and that Service is an ally and alter ego and an agent of Empire, and the defendant union says that the picketing was primary picketing and not secondary picketing.

* * *

"It becomes important that we understand what the law means by 'agent' and 'agency', and what it means by 'independent contractor'.

* * *

"Now as to the relationship between Empire and Service, if Service Cartage Company was merely an agent of Empire it would not be a separate, independent person, and you would find for the defendant.

"If, however, Service Cartage Company was not an agent but an independent contractor with Empire you may find that the necessary separateness and independence exists. The business relationship usually and ordinarily existing between one company and an independent contractor with such company, by reason of one company being an independent contractor with the other, will not destroy or prevent the necessary separateness and independence between the two companies and will not prevent the two companies from doing business with each other within the meaning of the Act.

"The essence of a secondary boycott is that its sanctions or pressures bear directly, not alone upon the employer who alone is a party to the labor dis-

pute, but directly upon some third party who has no concern in it * * *.

* * *

"Insofar as the terms 'agent, agency, neutral, neutrality, ally, alter ego' and 'independent contractor' are concerned the test boils down to this: are the two enterprises the same? If they are the same then the terms of the statute 'any other person' in the phrase 'to cease doing business with any other person' and the terms 'any other employer' in the phrase 'forcing or requiring any other employer to recognize or bargain with a labor organization' are not met. That is, if the two enterprises are the same.

"If the two enterprises, however, are not the same then these particular terms of these statutes are met.

* * *

"In determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether specific acts performed were actually authorized or subsequently ratified shall not be controlling.

"An independent contractor is one who is exercising an independent employment contracts (sic) to do certain work according to his own methods and without being subject to the control of his employer, except as to the result of his work.

"An independent contractor is one who carries on an independent employment in pursuance of a contract by which he has entire control over the work and the manner of its performance.

"One who contracts to do specific work, furnishing his own assistants and executing the work in accordance with either entirely his own ideas or a plan previously given to him by the person for whom the work is done, without being subject to the orders of

the latter with respect to the details of the work, is an independent contractor.

"The important test in determining whether a person employed to do certain work is an independent contractor or a mere agent is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work."

We think the crucial part of this charge is the summary:

"Insofar as the terms 'agent, agency, neutral, neutrality, ally, alter ego' and 'independent contractor' are concerned the test boils down to this: are the two enterprises the same? If they are the same then the terms of the statute 'any other person' in the phrase 'to cease doing business with any other person' and the terms 'any other employer' in the phrase 'forcing or requiring any other employer to recognize or bargain with a labor organization' are not met. That is, if the two enterprises are the same.

"If the two enterprises, however, are not the same then these particular terms of these statutes are met."

Here, the court brought together all of the vague doctrines it was expounding to the jury and summarized them in one succinct phrase, "are the two enterprises the same?"

This is an area where precise delineation is extremely difficult.[8a] Yet, we think the jury must have been misled when it was told that the defense was grounded in the fact that Service and Empire were the "same." Local 728's position was more intricate than that, as will become clear from the ensuing discussion. Courts have found employers were "allied" so as to deprive them of the protection of

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8a. See *Local 761 v. NLRB*, U.S. , 29 L.W. 4480, 81, 82 (1961).

the secondary boycott proscriptions in cases where the primary and secondary employer were not commonly owned,[9] and where they performed different services.[10] In neither of these situations could the two employers be said to have been the "same." In the case at bar, Empire and Service had different names. Could that be enough to render them not the "same"? Although the example may be somewhat facetious, it points up the difficulty inherent in the use of the word "same."

Local 728's first argument in defense was that Service was the "agent" of Empire. 29 U.S.C.A. Sec. 152 (2) provides that "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly * * *." If Service was the agent of Empire within the meaning of the Act, then Empire could not have been "any *other* person" or "any *other* employer" within the meaning of Section 303. (Emphasis added.) Certainly, Service was the agent of Empire for some purposes. It was Empire's agent for receiving freight consigned to Empire, for soliciting freight for Empire, for receiving telephone calls for Empire. The pertinent question here is whether Service was Empire's agent with regard to Empire's labor relations with the five over-the-road drivers temporarily stationed in Atlanta.[11] Cook, President of Local 728, testified, without contradiction, that:

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9. See *Local No. 24, International Brotherhood of Teamsters, etc.*, v. *N.L.R.B.*, D.C. Cir., 1959, 266 F.2d 675. See also, *National Labor Relations Board* v. *Local No. 728, International Brotherhood of Teamsters, etc.*, 5 Cir., 1956, 228 F.2d 791, 797.

10. *General Drivers, etc.*, v. *American Tobacco Co.*, Ct. App. Ky., 1953, 258 S.W.2d 903.

11. Cf. *National Labor Relations Board* v. *Condenser Corp.*, 3 Cir., 1942, 128 F.2d 67, 71.

"A. Yes, sir. During the—I think it's the first part of August or the middle of August, Mr. Mathis was assigned to that company and he was on vacation and the drivers complained to me on run-arounds and also where lessees had been running in their place.

"Q. What is meant by 'run-arounds'?

"A. Run-arounds is (sic) where a company will dispatch a junior driver out ahead of a senior driver, and I went to Service Cartage Company and Empire State Express on these particular grievances and talked to Mr. Viness, and Mr. Viness called Columbus. We got some of the problems out of the way.

"Q. You say 'we', who do you mean?

"A. Mr. Viness and myself, in reference to the lessees running instead of the regular drivers who we represented. He said they would generally run out of Columbus, and he called Columbus himself. It was late in the afternoon or the early evening, probably around six or seven o'clock, and I think he got Mr. Rowlenson on the phone and it was discussed briefly and he advised me at that time that he had a meeting set up with Mr. Mathis whenever he got back into town and he would work it out at that time, *whatever the problems were that we were unable, Mr. Viness and myself, to settle.*" (Emphasis supplied.)

Plaintiff's witness Viness testified that on August 26, the day the five over-the-road drivers refused to work, he called Local 728. The Local sent a man over to inspect the vehicles. Viness conferred with him about the refusal of the men to drive as several of them appeared to be under the influence of alcohol. Furthermore, Empire admitted that Viness dispatched and gave instructions to the five over-the-road drivers from August 1—August 26.[12] Mr.

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12 "(Admission) 54. Beginning August 1, 1955, and continuously until August 26 or 29, 1955, the five (5) over-the-road drivers of Empire who were domiciled in Atlanta, Georgia, were

Rowlenson, an owner of Empire, summarized the role Viness played vis-a-vis the over-the-road drivers in the following testimony:

> "Q. Mr. Rowlenson, during the period of time that the five over-the-road drivers who formerly worked for ACA were working for you and before this work stoppage occurred, did they ever receive any instructions or direction from Columbus?
>
> "A. Little or none. They received their instructions from Mr. Viness as was pre-arranged."

Local 728's second theory was that Service was an "ally" of Empire in labor dispute. The "ally" doctrine had its origin in *Douds* v. *Metropolitan Federation of Architects, etc.*, S.D.N.Y., 1948, 75 F. Supp. 672. It was approved and expounded upon in considerable detail in *National Labor Relations Bd.* v. *Business Mach. & Office A., etc.*, 2d Cir., 1955, 228 F.2d 553. Both cases held that the kind of secondary activity outlawed by the Taft-Hartley Act did not encompass "union activity designed to prevent employers from doing the farmed-out work of a struck employer." This was the rule at common law. *Iron Molders' Union* v. *Allis-Chalmers Co.*, 7 Cir., 1908, 166 Fed. 45, 51. Insofar as the "ally" doctrine is limited to "struck work" situations, we find it inapplicable to the facts of this case.[13]

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dispatched from the Atlanta Terminal of Service Cartage Company by Jack Viness, who was connected with and employed by Service.

* * *

"(Admission) 60. Empire State Express, Inc., admits that the five (5) over-the-road drivers of Empire domiciled in Atlanta for a period from August 1 to August 26 or 29, 1955, received their instructions from Jack Viness of Service Cartage Company."

13. "Common ownership and control" among the struck employers has been accepted as a defense to a charge of illegal secondary boycott. See Administrative Decision of NLRB General Counsel, 1953, Case No. 806; Teamsters Local 20, 1956, 115 NLRB

The difficulty with the test of whether the two enterprises are the same, as propounded by the district court to the jury, is that that test in its ordinary application is very different from what it should properly mean for purposes of this proceeding. For example, in *Local No. 24* v. *N.L.R.B.*, 1958, 266 F.2d 675, 680, the D. C. Circuit agreed with the contentions of the union as thus described by the trial examiner:

> "Rather, the Respondents (our petitioners) say, the businesses of the Lessors and ACE are so integrated operationally that for the purposes of this proceeding they must be deemed either a single employer, a joint or common venture, a 'straight line' operation within the Board's understanding of that term, or an alliance of interest. The Respondents maintain that whichever term may best be used to describe the relationship among ACE and the Lessors, their business arrangements are such that in the Union's dispute with the Lessors or any one of them neither ACE nor any of the Lessors is so unconcerned therewith that it is statutorily shielded as a neutral from an extension of the dispute by the Union to its operations, and, therefore, the Union's picketing and inducement herein occurred at premises which in this proceeding should be regarded as primary and not secondary."

Chief Judge Prettyman, speaking for the D. C. Circuit, said:

> "The answer to the problem before us cannot be reached by the use of any legalistic word or phrase,

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1290 at n. 5. In such situations the employers are often termed "allies." See Hawaii Teamsters Local 996, 1955, 111 NLRB 1220.

The "common ownership and control" test was criticized in *Albert* v. *United Brotherhood of Carpenters, etc.*, D. Mass., 1956, 143, F. Supp. 371, 376 n. 2.

The "common ownership and control" defense was rejected in *Bachman Machine Co.* v. *NLRB*, 8 Cir., 1959, 266 F.2d 599. See also *J. G. Roy & Sons Co.* v. *NLRB*, 1 Cir., 1958, 251 F.2d 771.

such as 'co-employer', or 'independent contractor', or even 'ally'. It cannot be solved by the strict application of the technicalities which adhere to such legal terms * * *.

"It is our view that the relationships of ACE, these drivers, and the lessor-owners are so intertwined with respect to employment that ACE was not protected by the statute against the impact of a strike by the drivers against the lessor-owners. The many tiny strands of ACE control over these drivers cannot be extricated from the total fabric of mutual obligation. Those strands are clearly part of the pattern of the employer-employee relationship.

"As we pointed out in Seafarers International Union, etc. v. N.L.R.B.,[6] this section (8) (b) (4) (A) and (B) cannot be read or applied literally; it must be construed. Of course, in an area so wide as is the field of labor relations, there are many situations in which the answer to a dispute under this section is easily derived by the application of such legalistic formulae as 'independent contractors', 'co-employers', or 'allies'. But it is equally clear that there is a zone of dispute in which such formulae are useless, and the answer must be derived by applying the intent of the statute to the facts in the case. This is such a case. We need not devise a new word to describe the relationship here depicted.

"[6] 105 U.S. App. D. C., , 265 F.2d 585 (1959)."[14]

We turn, then, to the intent of the Statute. At first the scope of Sections 8 (b) (4) and 303 of the Taft-Hartley Act was extremely imprecise. "This provision could not be literally construed: otherwise it would ban most strikes historically considered to be lawful, so-called primary

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14. Compare *United Mine Workers* v. *Osborne Mining Co.*, 6 Cir., 1960, 279 F.2d 716, 724.

activity."[15] The legislative history indicates the kind of secondary boycotts at which Sections 8 (b) (4) and 303 were directed.[16] The sponsor of the legislation, Senator Taft, stated that: "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employee."[17] He later noted that: "The secondary boycott ban is merely intended to prevent a union from injuring a third person who is not involved in any way in the dispute or strike, and therefore should not suffer economic damage simply because of the action of a labor organization. It (the secondary boycott ban) is not intended to apply to a case where the third person is, in effect, in cahoots with or acting as a part of the primary employer."[18] The requirement that the secondary employer be a "neutral" is firmly established in the case law. "As we understand this statute (8 (b) (4) (A)) there are two necessary requirements to find a violation of it. These are: (1) Independent *neutral employers* * * *, and (2) the union must have as an object of its picketing (or other activity) the inducement or en-

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15. *Local 761* v. *N.L.R.B.*, U.S. , 29 L.W. 4480 (1961). See 60 Yale Law Journal 684.

16. *Labor Board* v. *Denver Building Council*, 1951, 341 U.S. 675, 686. See *National Labor Relations Board* v. *Business Mach. & Office A., etc.*, 2 Cir., 1955, 228 F.2d 553; *Oil Workers International Union & Pure Oil Co.*, 84 NLRB 315.

17. 93 Cong. Rec. 4323.

18. 95 Cong. Rec. 8709.

That Section 8(b)(4) is aimed at protecting neutral employers is repeatedly emphasized in the legislative history of the Landrum-Griffin Act which amended the secondary boycott provisions. See Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 474, 808, 838, 976, 1197, 1386, 1499, 1519, 1580.

couragement of the *neutral employees* to engage in a concerted refusal to work for their *neutral employer*, so that the neutral employer will cease doing business with the *primary employer* * * *."[19]

The situation prior to August 1, 1955, when ACA was in existence is revealing. At that time the current employees of Service who are engaged in local cartage were employees of ACA, doing the same work. The five over-the-road drivers were also employees of ACA, performing the identical services they subsequently performed for Empire. Had the over-the-road drivers struck when ACA was in existence, it is clear that if they had induced a strike by their fellow employees who were engaged in the local cartage operations there would not have been an illegal secondary boycott. This would be true because no employees of "any other employer" had been induced to strike. In what way, if any, did events subsequent to July 31, 1955 convert what would not have been illegal prior to that date into a prescribed secondary boycott? ACA was split in two. The over-the-road drivers were now technically the employees of Empire, while the local employees worked for Service Cartage Company.[20] The economic fortunes

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19. *Retail Fruit & Veg. Clerks U.* v. *National Labor Rel. Bd.*, 9 Cir., 1957, 249 F.2d 591, 594. See also, *Carpenters' Union* v. *Labor Board*, 1958, 357 U.S. 93, 100; *Labor Board* v. *Rice Milling Co.*, 1951, 341 U.S. 665, 670-71; *J. G. Roy & Sons Co.* v. *National Labor Rel. Bd.*, 1 Cir., 1958, 251 F.2d 771, 772; *Douds* v. *Sheet Metal Workers Internat'l Ass'n*, E.D. N.Y., 1951, 101 F. Supp. 273, 277.

20. The drivers who worked out of the Atlanta terminal were not at all clear on who their employer was. One of the local drivers (supposedly an employee of Service) testified as follows:

"Q. Bishop, where are you employed?
"A. Well, I work, I guess it is Empire State.
"Q. Well, who pays you?
"A. Jack Viness pays me."

of the two companies were as inextricably interwoven as they were when both entities were ACA and Mr. Viness of Service still retained general supervision of the over-the-road drivers of Empire.

This latter fact is important not so much to show that Viness was technically the "agent" of Empire, as to illustrate the close relationship between the two companies. In supervising these drivers, Viness was exercising a management function of Empire. He ceased to exercise that function only when there were no longer any drivers to supervise, and not because he was disinclined to serve as supervisor, nor because Empire wished that he no longer do so. Insofar as Empire and Service were concerned, they were satisfied to have Viness continue as he had. Empire would argue to the contrary, pointing out that Viness's authority to dispatch these drivers was expressly revoked. This revocation, however, came after the over-the-road drivers refused to drive, when there was no one for Viness to supervise. And once the strike began, and it began when the drivers refused to drive, the employer could not make a change in form which would deprive the strikers of the right to call on their fellow drivers to support their action.[21]

The immediately preceding economic history of the two companies, plus the fact that nearly all of Service's

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Benefield, one of the striking over-the-road drivers, testified:

"Q. Do you know of your own knowledge who owns Service Company?

"A. I didn't even know there was a Service Cartage Company.

"Q. When did you first learn, if you did, that there is a company called Service Cartage Company?

"A. When we came out on strike."

21. Cf. *Seafarers International Union, etc.*, v. *N.L.R.B.*, D.C. Cir., 1959, 265 F.2d 585 (Prettyman, J.).

business was with Empire,[22] plus the fact that the over-the-road drivers were generally supervised and dispatched by Viness, establishing an overlapping of management functions between Service and Empire, convinces us that Service was not the unconcerned, neutral employer whom Sections 8 (b) (4) and 303 of the Taft-Hartley Act were designed to protect, and thus, that Empire was not the victim of an illegal secondary boycott. The district court erred in denying the defendant's motion for a directed verdict and its motion for judgment notwithstanding the verdict. The judgment is therefore reversed and the cause remanded with directions to enter judgment for the defendant.

REVERSED WITH DIRECTIONS.

A true copy

Test: (s) Edward W. Wadsworth

EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

August 1, 1961
(SEAL)

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22. See *United Mine Workers of America* v. *Osborne Mining Co.*, 6 Cir., 1960, 279 F.2d 716, 724.

## APPENDIX "B".

(Title Omitted).

**Opinion of District Court Striking Portions of Complaint and Ruling on Res Adjudicata and Estoppel.**

Bootle, District Judge:

Paragraph 26 of the complaint alleges that the National Labor Relations Board has decided that defendant local union violated as against plaintiff Section 8 (b) (4) (A) and Section 8 (b) (4) (B) of the Labor Management Relations Act, as amended, 29 U.S.C.A. 158, and that defendant local union has not obtained a review or an appeal of said decision by the Court of Appeals of the United States for the Fifth Circuit, but has accepted and complied with said decision. Both the defendant local union and the defendant International Brotherhood have filed written motion to strike Paragraph 26 of the complaint upon the ground that it alleges an adjudication of issues which, so far as this cause is concerned, can only be litigated in this cause, and that any adjudication by the Board or any other tribunal is in no way binding on this cause, and is in no way relevant to this cause, and that the allegations of said paragraph are extremely prejudicial to defendants, and said paragraph should therefore be stricken. Thereafter, the plaintiff amended its complaint by adding paragraphs Twenty-Sixth A and Twenty-Sixth B, alleging that the relationship between defendant local and defendant international is such that, under the law, defendant international was and is a privy of defendant local, and is therefore bound as a privy by said decision of the Board, and that under principles of res judicata,

collateral estoppel, and finality of judgments, said Board decision, a final decision because not appealed to or reviewed by the Court of Appeals of the United States for the Fifth Circuit, is binding upon the defendant local as a party thereto, and upon defendant international as a privy of defendant local and upon this Court in this action. Said amendment was allowed and ordered filed subject to objections and motions of either or both defendants. While no formal renewal of the motion to strike has been filed after the allowance of said amendment, both sides have filed written briefs in which the defendants urge that paragraph 26 should be stricken, and the plaintiff urges it should not. I shall treat the motion to strike as relating to paragraph 26 of the complaint and to the said amendment which adds paragraphs Twenty-Sixth A and Twenty-Sixth B.

For the reasons herein briefly to be stated, I think the motion should be granted and paragraph 26 of the complaint as amended should be stricken.

"In the last analysis, the question whether and to what extent an administrative decision operates as res judicata is a matter of interpreting the enabling statute."

42 Am. Jur., Public Administrative Law, Sec. 161, p. 522.

It is my view that the proceedings authorized by Section 10 of the Act, 29 U.S.C.A. 160, and by Section 303 of the Act, 29 U.S.C.A. 187, were intended to be entirely independent of each other. *United Brick & Clay Workers* v. *Denna Artware*, 198 F.2d 637 (6th Cir. 1952); *Longshoremen* v. *Juneau Spruce Corp.*, 342 U.S. 237, 244 (1952). The former section empowers any unfair labor practices affecting commerce, and by way of emphasizing the separateness and independence of proceedings under that section, the Congress said:

"This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C.A. 160 (a).

Then as an additional sanction against any labor organization which might become guilty of a secondary boycott the latter section, 29 U.S.C.A. 187, provided, for "whoever shall be injured in his business or property by reason" of such secondary boycott, a cause of action for damages sustained and cost of suit. Said last cited section begins with this statement: "It shall be unlawful, for the purposes of this section ONLY . . ." (Emphasis added.) While the full significance of the word "only" is not entirely clear, it is at least consistent with a desired and intended separateness and distinctness of the cause of action for damages provided by said section from other proceedings authorized by the Act. It is believed that there is persuasive authority for these views in *Denver Bldg. and Const. Tr. C.* v. *National Labor Rel. B.*, 186 F.2d 326, 330 (D.C. Cir. 1950), reversed on other grounds, 341 U.S. 675, 95 L. Ed. 1284.

We do not reach the question whether said decision of the Board possesses such finality as would normally cause the principle of res judicata to apply, nor the additional question, whether the defendant international, not being a party to the case before the Board, would be bound by said decision.

Accordingly, the above-mentioned motion to strike is hereby sustained, and paragraph 26 of the complaint, together with the amendment filed October 10, 1959, adding Paragraphs Twenty-Sixth A and Twenty-Sixth B, is hereby stricken.

This 16 day of December, 1959.

W. A. BOOTLE,
United States District Judge.

Filed: December 16, 1959.

## APPENDIX "C".

### Charge to the Jury by the District Court.

(Formal parts and parts not pertinent omitted.)

My responsibility has been to rule on every legal question that arose during this trial, and I have done that. And, of course, insofar as this Court is concerned, and that means these counsel and you jurors, every ruling I made was correct; and insofar as all of us here are concerned every principle of law which I state to you in this charge is correct. Now it may be wrong, but if so we have two Courts above me and they have no hesitancy in correcting any wrong which I make, and able counsel on both sides have no impairment when it comes to presenting those rulings to the higher Courts for review. But all of us here accept, we must accept, what I rule and what I instruct as the law applicable to this case, and of course we do all so accept.

Your responsibility and mine are tremendous responsibilities, and I am sure that you will approach yours as fairly and as conscientiously as I try to approach mine.

You are the sole and exclusive judges as to the facts in this case, and it is your responsibility to evaluate all of the testimony and to pass upon and decide and settle all factual phases of this dispute.

As you know, this is a civil case in which the plaintiff is Empire State Express, Inc., and in which the defendant is Truck Drivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The complaint sets out in written form what the plaintiff contends the facts in the case to be and asks for a judgment. The defendant came into Court at the proper time and filed its answer to that complaint in which it denies the material allegations of the complaint and says that it is not indebted to the plaintiff in any amount.

These pleadings, the complaint and the response, will go out with you to your jury room. They do not constitute evidence except insofar as there may be admissions contained in them of allegations made on either side. In the case where there are such admissions you may accept any such admitted facts as established without further proof.

It is not necessary for me to tell you, but I do tell you, that this Court will not express any opinion one way or the other about any of the disputed facts and issues contained in this case. I could do so, under the law applicable here, if I wanted to, provided I went further and told you that you were not to be bound by any such expression of opinion on my part, but I shall not express any such opinion. I want to leave absolutely to the judgment of this jury all of the factual issues that are before you as to what this evidence shows or fails to show.

Your authority, of course, is not to be exercised arbitrarily, but must be exercised with sincere judgment, with sound discretion, and in accordance with the rules of law as I shall state them to you.

The burden of proof in this case is on the plaintiff to prove every essential element of its case, not beyond a reasonable doubt as in criminal cases, but by what is known as a preponderance of the evidence.

And by preponderance of the evidence is meant that superior weight of evidence upon the issues involved

which, while not enough wholly to free the mind from a reasonable doubt is yet sufficient to incline a fair and reasonable mind to one side of the issue rather than to the other.

As I said, you are made by law the exclusive judges as to the credibility of all of the witnesses sworn in the case. If I had not already said so I say so now. In passing upon their credibility and in determining where the preponderance of evidence lies, you may consider all of the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their interest or want of interest, their bias or prejudice, if any exists, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, and the probability or improbability of their testimony and of the occurrences which they relate, and also their personal credibility insofar as the same may legitimately appear upon the trial.

Now what I have just said applies to all witnesses, including the expert witnesses. You are not bound by the testimony of any witness. The evaluation of it and of its credibility is for you. You may consider the number of witnesses, though the preponderance is, of course, not necessarily with the greater number.

The manner and conduct and appearance of witnesses on the stand before you are legitimate matters for consideration by you. A witness testifies under a solemn oath to tell only the truth and ordinarily a witness is to be assumed to be observing that oath, but this assumption may be overcome by various measures of credibility which you will apply in terms of your own every day common sense and experience with people and with events.

If, upon a consideration of the evidence, you find there is a conflict in the testimony between the witnesses it is your duty to reconcile such conflict if you can, so as not to impute perjury to any witness, and so as to make all of the witnesses speak the truth, but if you cannot so reconcile the testimony which you think best entitled to be believed by you.

You, at last, are the sole and exclusive judges as to what witness or witnesses or evidence you will credit or discredit and what evidence you will believe or disbelieve.

I want to caution you in one or two respects about three charts which were introduced in evidence, supplementing what I said to you about them at that time. They are prepared in view—or rather they are received in this case because of the complex nature of the evidence with respect to figures. There are isolated bits of evidence and the plaintiff should be permitted to assemble it for you and indicate what the proof was.

You should bear in mind that these charts are not themselves independent evidence. They are simply the plaintiff's conception, its contention, as to what the evidence already in has established. If they differ in any particular with your recollection as to the evidence you will disregard them in that respect. If they omit some of the plaintiff's evidence, as they necessarily must, since they are simply a summary, you must not disregard that other evidence. They are simply and solely for illustrative purposes, so that the evidence will be summarized, or attempted to be summarized, for your consideration, and I ask that you consider them in that light and not as independent evidence in and of themselves.

Now you have heard the oral contentions of the parties here, and I shall not undertake to restate all of them. I

will refer to a few paragraphs of the complaint and of the answer, these representing the written contentions of the parties, or at least a portion of them, and as I have said to you you may look at the entire pleadings if you want to.

I am going to call attention to Paragraphs 19 thru 25 of the complaint and to the answers to them, and then to Paragraphs 14 thru 17 of the answer.

The complaint says: "At all times material to this action the employees of Service"—and that means Service Cartage Company—"were hired and controlled in every respect by Service. Defendant dealt with plaintiff and with Service as separate entities. Neither plaintiff nor Service had control of the labor relations of the other."

That paragraph is denied by the defendant.

Paragraph 20 says, in substance: By engaging in, and by inducing and encouraging the employees of Service Cartage Company to engage in a concerted refusal in the course of their employment to perform any services for Service, an object thereof being to force or require Service to cease doing business with plaintiff, as in this complaint averred, defendant has engaged in, and did engage in, unfair labor practices, within the meaning of the Act. And that is the National Labor Relations Act or the Management Relations Act, whatever its current name is.

That paragraph is denied by the defendant.

The next paragraph says, in substance, that by engaging in, and by inducing and encouraging employees of Service Cartage Company to engage in a concerted refusal in the course of their employment to perform any services for Service Cartage Company, an object thereof being to force or require plaintiff to recognize or bargain with defendant as the collective bargaining representative of

employees of plaintiff, defendant not having been certified as the representative of such employees under the provisions of Section 9 of the Act, defendant has engaged in and did engage in unfair labor practices within the meaning of another specific subsection of the Act.

That paragraph is denied by the defendant.

Then the complaint alleges that the conduct of the defendant as set forth in Paragraphs 20 and 21, the two I just read, and elsewhere averred herein, was in violation of Sec. 303 (a) (1) and (2) and (b) of the Act, as well as Sec. 8 (b) (4) (A) and (B) of the Act, and plaintiff has been injured and damaged in its business and property by reason of such violations as set forth and sued for herein.

And that paragraph is denied by the defendant.

Paragraph 23 says, in substance, that the injury and damage sustained by the business and property of the plaintiff by reason of said illegal acts and conduct of the defendant during the period from August 1, 1955, and especially from September 13, 1955 to November 3, 1955 was so severe that it seriously crippled and impaired the entire business of plaintiff and the operating capital thereof, and said conduct of defendant resulted in diverting to other motor vehicle carriers of freight much business possessed by plaintiff and much business which would have been obtained by plaintiff had it not been for such conduct of defendant.

And that paragraph is denied by the defendant.

The 24th paragraph says by reason of the illegal acts and conduct of defendant against plaintiff, set forth above, plaintiff has been injured and damaged in the business and property of plaintiff, within the meaning of Sec. 303

(b) of the Act and plaintiff hereby sues defendant for the sum of $200,000, which plaintiff avers is the amount of damages sustained by plaintiff or such injury.

And the defendant denies that paragraph.

And in paragraph 25th, and this is the last one I shall read, the plaintiff alleges that at all times material it fully complied with its legal duty and obligation to defendant to minimize the damages claimed and sued for in paragraph 24th hereof, even to the extent of selling the franchises and assets of plaintiff when it became apparent that the illegal acts and conduct of defendant had so crippled and destroyed the business of plaintiff that to further operate the same would result only in additional damages. Plaintiff avers that with such damages so diminished defendant still has injured plaintiff in the amount of damages sued for in this suit.

That paragraph is denied by the defendant.

And then the defendant specifically sets up these contentions:

"Defendant Local Union alleges that at all times pertinent to this cause, complainant"—that is the plaintiff —"and Service Cartage Company had such a unity of interest and were so closely and intimately related and connected that Service Cartage Company was in no respect a neutral employer or wholly independent, but was a primary and not a secondary employer.

"The terminal of Service Cartage Company in Atlanta, Georgia was during all times pertinent hereto a place of doing business for Empire State Express and was the primary site of the dispute.

"At all times pertinent hereto Service Cartage Company was acting on behalf of and as agent of the complain-

ant herein and was not an independent neutral employer within the meaning of the National Labor Relations Act.

"At all times pertinent hereto complainant and Service Cartage Company were allied employers and Service Cartage Company was not an independent neutral employer within the meaning of the National Labor Relations Act."

Now, so much for the written contentions of the parties as contained in their pleadings.

Let me say to you at this point, Members of the Jury, that trade unionism is lawful in the United States. In fact, it is looked upon with favor by the laws of the United States and so far as these union organizations are concerned any person has a right to join and go along with them if such person wants to do so. The question in this case is whether there has been lawful or unlawful endeavor on the part of the defendant union.

The primary purpose of laws which relate to these matters is to maintain the full flow of commerce, to proscribe practices which affect commerce and are inimical or hostile to the general welfare and to protect the rights of the public in connection with labor disputes affecting commerce, and to prevent action by employers or employees which has the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce, while at the same time fully protecting the rights of employees to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection, and also to protect the right of the employee to refrain from any or all such activity.

The law gives a right of recovery against a labor union which represents employees in an industry affecting commerce to anyone who has been injured in his business or property by such union under certain circumstances and limitations. This right is given where such a labor organization in such an industry induces or encourages the employees of any employer to engage in a concerted refusal in the course of their employment to transport or otherwise handle any goods, articles or commodities or to perform any services in connection therewith.

These acts are actionable only where one of the objects of the incitement or encouragement is, first, to force or require any person to cease doing business with any other person, or, second, to force or require any other employer to recognize or bargain with such union as the representative of his employees unless such union has been certified as the representative of such employees by the National Labor Relations Board.

The words "industry affecting commerce", which I have just used, mean any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce, or the free flow of commerce.

It is admitted in this case that Empire's business was one affecting commerce. The word "commerce" includes trade, traffic, commerce, transportation among the several states or between any territory and any state.

The term "person" includes one or more individuals, labor organizations, partnerships, associations, and corporations.

The term "employer" as included in the Act includes any person acting as an agent of an employer, directly or indirectly; and the term "labor organization" means any

organization of any kind or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

It is admitted in this case that defendant was and is such a labor organization.

The term "employee" as used in the Act, shall include any employee and shall not be limited to the employees of a particular employer, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual having the status of an independent contractor.

In that connection I charge you that if you find that the five drivers of Empire State Express who worked out of the terminal of Service Cartage Company in Atlanta ceased to work as a consequence of, or in connection with, any current labor dispute and had not obtained any other regular and substantially equivalent employment at the time the picketing began on September 13, 1955, said drivers were, on said date, employees of the plaintiff, Empire State Express, Inc.

And I charge you further that if two or more employees ceased work because of a dispute over working conditions in their employment such employees ceased work because of a current labor dispute and, therefore, if you find that the five over-the-road truck drivers ceased work because of dispute over the condition of the equipment they were required to drive, you will find that they ceased work over a labor dispute.

Also, if you should find that two or more of said drivers ceased work because the plaintiff would not permit others of said drivers to drive on August 26, 1955, the drivers who ceased work in protest against said action of plaintiff ceased work as a result of a labor dispute.

Now, Members of the Jury, I know that sometimes it is a little tiring to have to read to you a lot of figures or a statute, but I invite your attention to three paragraphs of the Federal Code upon which this suit is based. It is Section 187 (a) (1) and (2) and (b) of Title 29 of the Code. The pertinent portions of it are as follows:

It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

First, forcing or requiring any employer or other person to cease doing business with any other person; or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Sec. 159 of this title.

And then subjaragraph (b) of this section says: Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section —which I have just read to you—may sue therefor in any district Court of the United States, subject to the limitations and provisions of Sec. 185 of this title, without re-

spect to the amount in controversy, or in any other Court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

In this case it is admitted that the activity being carried on by the plaintiff affected commerce, and it is admitted that the defendant was and is a labor organization.

The plaintiff, Empire State Express, Inc., in order to show liability on the part of the defendant, must prove by a preponderance of the evidence, first, that the defendant union induced or encouraged the employees of Service Cartage Company, an employer, to engage in a concerted refusal in the course of their employment to perform any services, or to transport or otherwise handle any goods, and the plaintiff must go further and prove that one of the objects of such inducement or encouragement, if there was any, was to force or require Service Cartage Company to cease doing business with Empire State Express, Inc., and that Empire was a person other than Service Cartage Company; or that one of the objects of such inducement and/or encouragement, if there was any, was to force or require Empire State Express, Inc., to recognize or bargain with defendant union as the representative of Empire's employees, and that Empire was an employer other than Service Cartage Company, it being admitted in this case that the defendant union was not certified by the National Labor Relations Board as the collective bargaining representative of the employees of Empire. And in order to recover the plaintiff must prove that the plaintiff was injured in its business or property as a direct and proximate result of such acts.

If the plaintiff proves these things by a preponderance of the evidence it is entitled to recover.

Empire claims that with respect to the first prohibited object named in the statute, namely, "to cease doing business with any other person", it comes within the classification "any other person" as distinguished from Service Cartage Company. And Empire claims that with respect to the second prohibited object named in the statute, namely, "forcing or requiring any other employer to recognize or bargain with a labor organization", it comes within the classification of "any other employer" as distinguished from Service Cartage Company.

Empire says that it and Service were, at all times material here, separate and independent companies; that Service was not an agent or employee of Empire, but was an independent contractor with Empire. And Empire claims that the defendant union had a labor dispute with it, but had no labor dispute with Service, and that the defendant union, for both of the prohibited objects which I have described, induced and encouraged the employees of Service—and when I say "Service" here it means Service Cartage Company—to engage in a concerted refusal in the course of their employment to perform any services for Service Cartage Company or to transport or otherwise handle any goods for Service Cartage Company, and that in connection with this inducing and encouraging the defendant union caused to be put up a picket line at the place of business of Service Cartage Company in Atlanta on September 13, 1955, and kept it there until November 3, 1955 when the picketing was restrained by a temporary injunction, and that, as a direct and proximate result of that inducing and encouraging and of the picketing, plaintiff's operations were reduced just about to a standstill and that plaintiff was injured in its business and property as a direct and proximate result of such acts.

Now you understand, of course, that what I have been stating right in the last few seconds is the contentions of Empire. That is one side of the case, according to the contentions.

I pause here to tell you what has been stipulated in your presence: that in connection with the grant of a temporary injunction on November 3, 1955, by some other Court, it was not necessary for such Court to adjudicate the merits of this controversy here, and he did not do so.

Now the defendant union denies these claims of the plaintiff. It does not deny the picketing. It admits that on September 13, 1955 it placed pickets at the Atlanta, Georgia, terminal of the Service Cartage Company, and that the pickets carried signs stating that defendant union was on strike against Empire State Express, Inc.

It admits also that from August 1, 1955 until September 7, 1955, and thereafter, the defendant union insisted and demanded that Empire execute a union contract with the defendant, recognizing the defendant as the bargaining representative for the employees of Empire and covering grievances, wages, rates of pay and other conditions of work for the employees of Empire.

It admits also that no representation petition was filed with the National Labor Relations Board in Atlanta by the defendant union for the purpose of being certified as a bargaining agent or representative of the employees of Empire between August 1, 1955 and November 3, 1955, or at any time after November 3, 1955.

It contends, however, that Empire and Service are not separate companies. In addition to the defendant's contentions as I read to you from its answer in this case, it contends that Empire and Service were one company,

or in effect one company, or substantially the same company; that Service is part and parcel of Empire; that Service is actually an arm of Empire, and that Service is an ally and alter ego and an agent of Empire, and the defendant union says that the picketing was primary picketing and not secondary picketing.

The defendant also denies that it has damaged the business or the property of the plaintiff.

It becomes important that we understand what the law means by "agent" and "agency", and what it means by "independent contractor".

This question of agency is important, both with respect to those who acted for the union and with respect to determining the true relationship between Empire and Service.

A labor organization can act only through its officers and agents. The plaintiff claims that the defendant acted here through Mr. Mathis and Mr. Johnson and Mr. Cook.

The evidence shows that Mr. Weldon Mathis was Secretary-Treasurer of the defendant and that Mr. Albert Johnson was Assistant Business Manager, and that Mr. Cook was President and Business Manager.

It is for you to say whether what they did, if anything, in committing or assisting in the commission of the acts charged or any of them, or in entertaining any objects or purposes, if you find that such acts were committed or that such objects were entertained, was within the scope of their employment.

A labor organization is liable for the unlawful acts of its officials when they are acting within the course and scope of their employment. It is liable even though such

unlawful acts were not authorized or were forbidden, if they were done to advance the interests of the principal and were within the scope of their employment.

To decide whether these acts were within the course and scope of the employment of the particular official or agent or employee, you must determine that the acts were done when the official or agent or employee was pursuing the business of the union, his principal, and that the union could have foreseen that such unlawful acts might occur in the performance of such employment.

The defendant union would be liable if any unlawful acts were directly authorized by it, or if they were ratified by it after having knowledge of the acts done on its behalf. In determining whether such acts were authorized or ratified you may consider all of the circumstances under which they were done, together with the actions, if any, of the union.

Now as to the relationship between Empire and Service, if Service Cartage Company was merely an agent of Empire it would not be a separate, independent person, and you would find for the defendant.

If, however, Service Cartage Company was not an agent but an independent contractor with Empire you may find that the necessary separateness and independence exists. The business relationship usually and ordinarily existing between one company and an independent contractor with such company, by reason of one company being an independent contractor with the other, will not destroy or prevent the necessary separateness and independence between the two companies, and will not prevent the two companies from doing business with each other within the meaning of the Act.

The essence of a secondary boycott is that its sanctions or pressures bear directly, not alone upon the employer who alone is a party to the labor dispute, but directly upon some third party who has no concern in it. It has one or both of two objects: first, to compel the third party to stop doing business with the employer who is a party to the labor dispute in the hope that that will induce such employer to give in to his employees' demands; or, second, to force or require the employer to recognize or bargain with the Union as the representative of his employees when such union has not been certified as the representative of such employees by the National Labor Relations Board.

Insofar as the terms "*agent, agency, neutral, neutrality, ally, alter ego*" and "*independent contractor*" are concerned the test boils down to this: are the two enterprises the same? If they are the same then the terms of the statute "any other person" in the phrase "to cease doing business with any other person" and the terms "any other employer" in the phrase "forcing or requiring any other employer to recognize or bargain with a labor organization" are not met. That is, if the two enterprises are the same.

If the two enterprises, however, are not the same then these particular terms of these statutes are met.

The relation of principal and agent arises wherever one person expressly or by implication authorizes another to act for him, or subsequently ratifies the acts of another in his behalf. Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

Agency is a contractual relationship, deriving from the mutual consent of the principal and agent that the

agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested by conduct, sometimes even passive acquiescence as well as by words. Authority to act as agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority.

An agent is one who has authority from another to act for him in a matter of some business or transaction, and in performing said business or transaction acts under the direction and at the instance and request of such other person.

A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the scope of his employment if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.

In determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether specific acts performed were actually authorized or subsequently ratified shall not be controlling.

An independent contractor is one who in exercising an independent employment contracts to do certain work according to his own methods and without being subject to the control of his employer, except as to the result of his work.

An independent contractor is one who carries on an independent employment in pursuance of a contract by

which he has entire control over the work and the manner of its performance.

One who contracts to do specific work, furnishing his own assistants and executing the work in accordance with either entirely his own ideas or a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter with respect to the details of the work, is an independent contractor.

The important test in determining whether a person employed to do certain work is an independent contractor or a mere agent is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work.

If, after applying the rules of law as I have given them to you in these instructions to the facts as you find them to be, you conclude that the plaintiff is not entitled to recover, you would end your investigation at that point and return a verdict for the defendant.

If, on the other hand, you decide that the plaintiff is entitled to recover you must go a step further and take up the question of damages to be awarded.

(Excerpts, Rec., pages 752-770.)

(Full Charge, Rec. 751-775.)

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 23 1961
JAMES R. BROWNING, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 458

EMPIRE STATE EXPRESS, INC.,

Petitioner,

vs.

TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COMMERCIAL RECORDER FORT WORTH TEXAS—10-18-61—50

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Now comes the Respondent named hereinabove and files its brief in opposition to the Petition for Writ of

Certiorari to United States Court of Appeals for the Fifth Circuit, and Respondent prays that this Court deny the Petition for Writ of Certiorari.

## I. OPINIONS BELOW

Petitioner refers to a decision of the National Labor Relations Board, Case No. 10-CC-131, 116 NLRB 615, as being an "Opinion Below". Respondent points out that this is inaccurate; the NLRB decision referred to was a proceeding independent of, and a decision rendered prior to, the institution of the damage action now before this Court on Petition for Certiorari. Respondent further shows that although Petitioner urged the District Court to rule on the question of the NLRB decision being res adjudicata, upon the District Court rejecting such contention the question was never raised in the Circuit Court and was never before the Circuit Court for consideration.

## II. QUESTIONS PRESENTED

In regard to the portion of Petitioner's Application for Certiorari designated as "Questions Presented", Respondent points out to this Court that the injunction of November 3, 1955, referred to in Question 1 (Page 3 of Petitioner's Application) was a proceeding under Section 10 (1), LMRA, and was not a proceeding in which the merits of the case were in issue.

## III. STATUTES INVOLVED

Pertinent statutory provisions, in addition to those contained in Petitioner's application:

*29 USCA 152(2)*—"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly—".

*29 USCA 152(13)*—"In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

*29 USCA 142(2)*—"The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operation by employees."

## IV. ADDITIONS AND CORRECTIONS TO STATEMENT OF THE CASE

### A. PRELIMINARY STATEMENT

Although there were many assignments of error which Respondent placed before the Circuit Court for consideration in Respondent's appeal from the adverse judgment of the District Court, the Circuit Court's

decision made it unnecessary that that Court rule on the other assignments of error before it.

In regard to the question of whether an unlawful secondary boycott had been committed by Respondent, Respondent's position in the District Court, the Circuit Court, and before this Court, was, and is, that there was no dispute in any material facts which concern the question of whether an unlawful secondary boycott had been committed by Respondent. While Respondent does not agree with Petitioner's statement that all material facts were *admitted* in the case, nevertheless it is correct that those material facts which were not admitted were in fact uncontroverted.

### B. STATEMENT OF THE FACTS RELIED ON BY RESPONDENT

In view of the fact that the Statement of Facts "Relied on by Respondent", contained in Petitioner's Application, are grossly incomplete, and fail to make reference to the pages of the Record, Respondent hereby submits the facts upon which it primarily relied on the question of whether a secondary boycott was committed.

As pointed out in the opinion of the Lower Court, prior to August 1, 1955, there existed in the State of Georgia an over-the-road truck line known as ACA Motor Lines, Inc. (hereinafter referred to as ACA). ACA's territory covered a number of communities south and southwest of Atlanta, its northern terminus

and headquarters. In Atlanta, ACA collected freight from local shippers and distributed to local consignees. ACA performed its own pick-up and delivery work. The freight was brought to ACA's terminal and loaded in its trailers for shipment south to the communities it served.

ACA went out of business on or about August 1, 1955, and sold its franchise and some of its equipment to Petitioner, and Petitioner began its operations on August 1, 1955. Petitioner did not engage in pick-up and delivery operations itself in Atlanta. Instead, Petitioner entered into a contract with Service Cartage Company (referred to hereinafter as Service) which was a partnership composed of one Viness and one Busby, and under the agreement Service agreed to handle the pick-up and delivery of Petitioner's freight in Atlanta. Among other things, under the Agreement, Service was to maintain a terminal in Atlanta to serve as a pick-up and distribution center for freight carried by Petitioner. All of Service's employees (pick-up and delivery men) were former employees of ACA for whom they had performed similar pick-up and delivery work. Thus, subsequent to August 1, 1955, the employees who previously had performed over-the-road driving for ACA out of Atlanta were now performing over-the-road driving for Petitioner out of Atlanta and the employees who had previously performed pick-up and delivery work in Atlanta for ACA now were performing pick-up and delivery work in Atlanta for Service.

Petitioner decided to base its operations at its home office in Columbus, Georgia. This created the problem of what to do about the over-the-road drivers domiciled in Atlanta who were the former employees of ACA. Petitioner desired that these driver move to Columbus, Georgia as soon as possible. In the meantime they were to work out of Atlanta driving Petitioner's trucks south. While based in Atlanta, these drivers were to be, and were, dispatched by Mr. Viness of Service.

On August 26, 1955, the five over-the-road drivers refused to drive the trucks from the Atlanta terminal because they claimed the equipment was unsafe. The following day Petitioner sent other of its employees from Columbus to Atlanta in order to move the trucks. The five over-the-road drivers never returned to work, although they did go to the Atlanta terminal at various times. These drivers were never given notice of discharge and no one was hired to replace them.

The five over-the-road drivers were members of Respondent Union. On July 28, 1955, prior to Petitioner's commencing its business operations, an official of Respondent had contacted Petitioner requesting that Petitioner recognize Respondent as the exclusive bargaining representative for the five drivers. The issue was discussed, but not decided at that time. On August 29, an official of Respondent again contacted Petitioner in regard to signing a contract recognizing Respondent as the bargaining agent for the five

drivers. Petitioner took the position that it had no over-the-road drivers belonging to Respondent Union "because of what took place" on August 26, stating that "they refused to work and—anytime anyone refused to work and operate and do that which they were told to do, they automatically quit and left our employ." On or about September 9 or 10, Petitioner specifically made clear its refusal to recognize Respondent as the bargaining agent for the five drivers.

On September 13, Respondent established a picket line at the Atlanta terminal, the pickets carrying signs stating that the Local was on strike against Empire State Express. Upon the picketing commencing, a representative of Respondent told the employees of Service to go out on strike and they did so go out on strike.

The telephone at the Atlanta terminal was listed in the name of Petitioner (R. 96). The telephone at the Atlanta terminal was not listed in the name of Service at all (R. 96). That telephone was on a number of occasions answered "Empire State Express" (R. 96). One of the local drivers testified that, after he was actually in the employ of Service, that "When I walk in the building I say, 'Have you got anything for Empire State Express?' ". (R. 697).

There were no signs on the terminal building of Service in Atlanta indicating that it was the terminal of either Service or Empire. Both Empire and Service distributed to shippers printed circulars which

advertised the Atlanta terminal as that of Empire and made no mention of Service.

Practically all of the freight handled by Service from the date of commencement of business of Petitioner and Service up until the commencement of the picketing was freight of Petitioner and any freight handled for other carriers by Service was almost negligible (R. 93).

Service permitted Petitioner to keep all of its tractors, trailers and other equipment not on the road or temporarily not in use, as might be convenient or desired by Petitioner, at the terminal of Service in Atlanta (R. 94).

From August 1, 1955, to August 26, 1955, Service did not own any trailers, and when trailers were necessary in expediting business, Petitioner permitted Service to use Petitioner's trailers and this interchange of equipment was engaged in by Petitioner and Service not only through August 26, 1955, but also to about August 15, 1956 (R. 96). From August 1, 1955, through the month of September, 1955, Service owned three trucks and two tractors and during said period Petitioner lent to Service, without charge, one of Petitioner's trucks. (R. 97). From August 1, 1955, to August, 1956, the tractors owned by Service, in order to expedite pick-up and delivery in Atlanta, pulled trailers belonging to Petitioner and bearing the name of Petitioner (R. 97).

On August 1, 1955, and through the month of September, 1955, Service did not own any trailers and when trailers were necessary for pick-up of large loads of freight or delivery of same, the trailers of Petitioner were used (R. 98).

The five over-the-road drivers of Petitioner who were domiciled in Atlanta received their instructions from Jack Viness, partner of Service, from August 1 until they struck on August 26. (R. 94). From August 1, 1955, to the time they struck on August 26, 1955, Mr. Viness kept the telephone numbers of the five over-the-road drivers of Petitioner residing in Atlanta and Viness called them to report to work in Atlanta (R. 94). From August 1, 1955, to August 26, 1955, the log books and time records of the five over-the-road drivers were delivered by the drivers to Viness at the terminal in Atlanta and Viness immediately sent them to Columbus, Georgia. (R. 95). The checks for payment of the wages of the drivers operating out of Atlanta were sent to Mr. Viness and Viness distributed such checks to the drivers at the Atlanta terminal (R. 95).

There was uncontradicted testimony at the trial. by the President of Respondent Union, that Mr. Viness acted as Petitioner's agent in regard to Petitioner's labor relations with the five over-the-road drivers who were later involved in the dispute (R. 712, 713).

As pointed out in the opinion by the Circuit Court, Mr. Rowlenson, one of the owners of Petitioner, ad-

mitted that the five over-the-road drivers who were later involved in the dispute received "little or none" in instructions or directions from the home office of Petitioner in Columbus, Georgia, but "they received their instructions from Mr. Viness, as was prearranged".

As was also pointed out by the Circuit Court, the relationship between Petitioner and Service was so close that at least one of the local drivers, who in fact was an employee of Service, testified that he "guessed" he worked for Empire State (Petitioner) although his testimony showed he knew that Viness was the man who paid him (R. 696). Another of the local drivers, who in fact was at the time an employee of Service, testified to the effect that he did not even realize there was such a company as Service Cartage Company until he received his first pay check which was written by Service Cartage Company. (R. 704).

The facts in this case show that for all practical purposes the work of the five over-the-road drivers and of the local pick-up and delivery men was maintained in practically the same operation after Petitioner assumed the over-the-road operation of ACA and Service assumed the pick-up and delivery work of ACA in Atlanta as had been maintained when both operations were being performed by one corporate entity. To paraphrase the Circuit Court, the economic fortunes of Petitioner and Service were as inextricably interwoven as were the pick-up and delivery

operations and over-the-road operations of ACA when ACA was performing both functions.

## V. SUMMARY OF ARGUMENT

Concisely stated, this Court should deny certiorari for the reasons set forth below:

### A. THE LOWER COURT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT, DECISIONS OF THE FIFTH CCA, OR DECISIONS OF OTHER CIRCUIT COURTS OF THE UNITED STATES.

The essence of the holding of the Lower Court is two-fold:

(1) A third party is not insulated from picketing activity unless it is an unconcerned neutral to the dispute, and

(2) The uncontroverted facts belonging to this particular case show that Service was not an unconcerned neutral to the dispute.

Insofar as Respondent has been able to ascertain, the proposition that only a neutral, unconcerned, third party is protected by the secondary boycott provisions of the Act is a proposition which has not been denied by any of the Appellate Courts of the Federal Judiciary.

**B. NO SUBSTANTIAL BENEFIT TO THE DEVELOPMENT OF THE LAW, OR TO THE GUIDANCE OF THE LOWER FEDERAL COURTS, WOULD BE SERVED BY THIS COURT ATTEMPTING TO SPELL OUT A "COLLEGIATE-DICTIONARY" TYPE DEFINITION OF A "NEUTRAL PARTY".**

As has been recognized by the Courts, the variations of factual situations to which this area of law must be applied are almost infinite. The various and sundry economic alignments which will result in such varying factual situation cannot be predicted, with accuracy, by any individual or tribunal. Consequently, no "pat" definition which may be arrived at would be of substantial benefit to any Court attempting to determine whether such definition would fit a particular employer within a particular factual situation.

**C. THE CONTENTION THAT THE LOWER COURT "DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS—" SO AS TO CALL FOR EXERCISE OF THE POWER OF SUPERVISION BY THIS COURT IS NOT ONLY WITHOUT ANY MERIT, BUT MERELY CONSTITUTES A DEROGATORY ATTACK UPON THE PANEL OF JUDGES WHO DECIDED THIS CASE BELOW.**

The contention of Petitioner in this respect appears to be based, in the main, on two grounds:

(1) That the lower Court "usurped" the powers of the jury, and

(2) The lower Court improperly commented on the charge to the jury by the Trial Court.

The Petitioner's position concerning the lower Court's "usurping" the jury's powers and functions is completely destroyed by its own brief, as will be more thoroughly pointed out hereinafter.

While it may not have been *necessary*, in view of the points on which the lower Court decided this case, for the Lower Court to comment on the charge to the jury, nevertheless it is within a judicial body's power and propriety to so comment if it chooses to do so.

### D. NO ERROR WAS COMMITTED BY THE LOWER COURT.

The Lower Court's decision was a correct one, and in keeping with the intent of the Act, as abundantly shown by the legislative history of the original Act, as well as by the legislative history of recent amendments to the Act. The basic premises of the lower Court's decision in this case are consistent with the decisions of practically all, if not all, the Appellate Courts within the Federal Judiciary.

## VI. ARGUMENT

### A. THERE IS NO CONFLICT BETWEEN THE DECISION IN THE CASE AT BAR AND OTHER AUTHORITATIVE FEDERAL DECISIONS IN THE SAME AREA OF THE LAW.

As pointed out by the lower Court in its decision (Petitioner's Application, A15) the requirement that the secondary employer be a "neutral" to have the protection of the law is firmly established in the case law. *Retail Fruit and Vegetable Clerk's Union v. National Labor Relations Board*, 1957 9 Cir., 249 F. (2d) 591, 594; *Carpenter's Union v. National Labor Relations Board*, 1958, 357 U.S. 93, 100, 78 S.Ct. 1011, 1017; *National Labor Relations Board v. International Rice Milling Company*, 1951, 341 U.S. 665, 670-71, 71 S.Ct. 961, 964; *J. G. Roy & Sons Co. v. National Labor Relations Board*, 1 Cir., 1958, 251 F. (2d) 771, 772; *Local No. 24 v. National Labor Relations Board*, 1958, 266 F. (2d) 675, 680, D.C. Cir.

The solitary case cited by Petitioner which indicates a conflict with the decision of the Court below is the District Court decision cited as *Curto v. Longshoremen's and Warehousemen's Union CIO*, 107 F. Supp. 805, footnote 15. In that case the District Judge apparently took the position that if the two employers involved are not "the same" then the third party employer is completely protected from any appeal to its employees no matter how involved it may be, as a practical fact, in the dispute. Respondent

submits that this District Court's position has been refuted, time and again, by the Appellate Courts of the Federal Judiciary and certainly poses no conflict worthy of this Court's resolution.

In the decision of Judge Hand, referred to in the Petition for Certiorari, *International Brotherhood of Electrical Workers Local 501 v. National Labor Relations Board*, 181 F. (2d) 34, the joint venture referred to by Judge Hand consisted only of the fact that two companies were working on the same construction job; this certainly does not remove one of the parties working on this job from the protection of the Act simply because of that fact. It has never been contended by Respondent in this case, nor is it contended at this point, that the law was other than as stated in a situation such as that which existed in the Local 501 case.

Certainly the decision of the Lower Court does not raise any conflict with other Federal Appellate decisions which requires review by this Court.

**B. NO BENEFIT WOULD RESULT FROM THIS COURT DEFINING A "NEUTRAL PARTY".**

At Page 40 of Petitioner's Application for Certiorari, Petitioner's counsel states as follows:

> We begin, of course, with the premise that in such a legal area no all-embracing guide can be announced, and each case must be decided some-

what if not altogether on its own facts, circumstances, and most important of all, the particular relationships therein existing."

Insofar as this particular case is concerned the quoted statement of Petitioner's counsel that "—in such a legal area no all-embracing guide can be announced—" would appear to, in effect, estop Petitioner from going further and requesting this Court to announce some "all-embracing guide" by laying down a "definition" of a neutral employer to be used by the lower Courts in all cases of this nature which come before them.

However, believing that it is the province of this Court to look beyond the mere considerations of the narrow interests of the parties to this particular litigation, it is felt proper to consider whether the announcement of such a "definition" by the highest Court in the land would be of service in development of the law in this area and in guidance of future disputants. It is the position of Respondent that it would not.

Unfortunately, in the past history of the law, legislators, lawyers, and judiciary have been guilty of lagging behind the changing realities of our society and of our economy and have been too prone to attempt to lay down legalistic formulae and expect such formulae to be sensibly applied to varying factual situations presented to the Courts. Perhaps in the simple society and economy that existed many years

ago this approach was adequate, and perhaps it was best. But such an approach cannot be sensibly used in today's society and economy.

Fortunately, in recent years the Courts, and particularly the Federal Judiciary, have progressively recognized that the complexities of today's society and economy are such that the use of pat definitions and legalistic words or phrases cannot be pulled from a hat and applied, with justice, to the many diverse factual situations which occur in life.

In the particular area of the law which we now have under consideration, Respondent feels that it cannot improve upon the statement of Chief Judge Prettyman, speaking for the D.C. Circuit, in the case of *Local No. 24 v. NLRB*, 1958, 266 F. (2d) 675, 680, when he stated that:

> "The answer to the problem before us cannot be reached by the use of any legalistic word or phrase, such as 'coemployer', or 'independent contractor', or even 'ally'. It cannot be solved by the strict application of the technicalities which adhere to such legal terms—.
>
> "It is our view that the relationships of ACE, the drivers, and the lessor-owners are so intertwined with respect to employment that ACE was not protected by the statute against the impact of a strike by the drivers against the lessor-owners. The many tiny strands of ACE control over these drivers cannot be extricated from the

total fabric of mutual obligation. Those strands are clearly part of the pattern of the employer-employee relationship.

"As pointed out in *Seafarers International Union, etc. v. NLRB*, this section (8)(b)(4)(A) and (B) cannot be read or applied literally; it must be construed. Of course, in an area so wide as is the field of labor relations, there are many situations in which the answer to a dispute under this section is easily derived by the application of such legalistic formulae as 'independent contractors', 'coemployers', of 'allies'. But it is equally clear that there is a zone of dispute in which such formulae are useless and the answer must be derived by applying the intent of the statute to the facts in the case. *This is such a case. We need not devise a new word to describe the relationship here depicted.*" (Emphasis supplied).

This Court stated, in *Local 761 International of E. R. & M. Workers v. NLRB*, 81 S.Ct. 1285, in discussing how the courts had applied the Moore Dry Dock standards, that "As is too often the way of law or, at least, of adjudications, soon the Dry Dock tests were mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity."

The adoption of formulae, and of standards, by authoritative tribunals is often necessary and of tremendous benefit to the guidance of parties and to lower tribunals, but "as is too often the way of law—" there

is ever the tendency to, in an effort to comply with the pronouncements of the higher tribunal, "mechanically" apply such standards and, also often, this inevitably results in an attempt to fit a "square" definition or standard to a "round" factual situation—and the end result is manifest injustice!

As stated by Judge Prettyman in the Local No. 24 case, supra, "—the answer must be derived by applying the intent of the statute to the facts in the case."

Is the intent of the statute not clear by this time? The sponsor of the original legislation, Senator Taft, is officially on record in stating the intent of these provisions of the statute and his statements in this regard have been quoted to this Court on so many occasions that it is not deemed necessary to repeat them at this time. The legislative history of the Labor-Management Reporting and Disclosure Act of 1959, as cited in Footnote 18 of the Lower Court's decision in this case, re-emphasizes and reiterates the intent of the original legislation. The vast majority of the courts have accepted and recognized, without considerable difficulty, the clear intent of the legislation. This being true, should there be great difficulties in following the suggestion of Judge Prettyman and applying the intent of the statute to the facts in a given case? Should this Court respond to the call, made again and again by unsuccessful litigants in the Circuit Courts, to place a strait-jacket of legal formulae on every question of law?

**C. THERE IS NO MERIT IN PETITIONER'S CONTENTION THAT THE LOWER COURT DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THE POWER OF SUPERVISION BY THIS COURT.**

Petitioner appears to base this contention, in the main, on a contention that (1) the lower Court "usurped" the powers of the jury, and (2) the lower Court improperly commented on the trial Judge's charge to the jury.

At Page 4 of Petitioner's Application for Certiorari Petitioner states that:

> "There were controverted questions of fact, and Petitioner and Respondent placed different interpretations on proven facts, all submitted to the jury for verdict; but nevertheless, the lower Court usurped the function of the jury in passing on such issues—".

If Petitioner is to substantiate his contention that the lower Court "usurped" the function of the jury, Petitioner must, of course, contend that there were controverted, material, facts pertaining to the question of commission of an unlawful secondary boycott. Certainly if the facts were *not* in dispute on this issue, then it became the duty of the Court, not of the jury, to announce the legal conclusion and effect of such uncontroverted facts.

Were there controverted, material, facts on the issue of whether a legal boycott had been committed? First, let us see whether the Petitioner is consistent in stating that there were controverted, material, facts which the jury could properly pass upon.

After making the above quoted statement at Page 4 of its Application, we find the following statement of Petitioner at Page 7 of its Application for Certiorari:

> "*In the end, there was not a single controverted or contested fact left for the jury to decide with regard to the boycott issue;*—" (Emphasis supplied).

Also, at Page 7 of the Petitioner's Application for Certiorari (in fact in the *very next paragraph*) we find Petitioner making this statement:

> "The only issue between Petitioner and Respondent on the boycott question was completely legal.—".

What was Petitioner's position in the Trial Court in this regard? At Page 26 of Petitioner's Application for Certiorari its position in the trial Court is revealed. As stated at Page 26, attorneys for Petitioner moved for a directed verdict on the boycott issue, with the following motion:

> **"Mr. Swinson: Your Honor, the plaintiff moves for directed verdict against the defendant on the issue of liability alone, or that the Court instruct the jury to the same effect; that is, that the issue of liability would not be decided by the jury and that only the issue of damages will be submitted."**

In view of the above position taken by Petitioner, both in this Court and in the Trial Court, how can Petitioner, in seriousness, now contend that the Circuit Court "usurped" the jury's function insofar as the question of commission of an unlawful boycott was concerned?

This particular question probably is the sole and solitary one upon which the parties litigant have been in agreement, up until this time. The record reflects (R. 744) that Respondent also moved for a directed verdict on the entire case to the Trial Court and it was one of the positions of Respondent, in so moving the Court, that there were no disputed material facts in regard to the question of liability. The difference between the parties litigant, at all stages of this case, has been that Petitioner claimed that the legal result of the facts required a finding that an illegal boycott had been committed, whereas Respondent has contended that the legal result of the facts required a finding that no illegal boycott had been committed.

While counsel for Respondent appreciate the desire of a capable and competitive attorney to salvage his

case, nevertheless it is difficult to understand how counsel for the Petitioner can seriously make any contention that the Circuit Court "usurped" a jury's function in regard to the question of liability.

The next position on which Petitioner appears to contend that the Circuit Court should be "supervised" by this Court seems to be hinged to the fact that the Circuit Court commented on and criticized the Trial Court's instruction to the jury, although the Circuit Court eventually held that this was a case which should never have been considered by the jury.

In all fairness, a statement that there was no necessity for the Circuit Court to comment on the instructions to the jury might have considerable weight, if limited to that statement. Surely, however, no criticism beyond such a comment could justifiably be made of the Circuit Court's commenting upon the instructions to the jury.

As indicated earlier in this brief, there were innumerable assignments of error presented to the Circuit Court by Respondent, in addition to the one upon which the case turned in the Circuit Court. The Circuit Court did not see fit to comment on those questions not necessary for a final determination of the case. However, had they done so, would this be any basis for a blistering attack upon the Circuit Court? Would such be any basis for a statement that the respected panel of Judges who decided this case should be placed under "supervision"? Would such be justi-

fication for the statement made by Petitioner's counsel (Application for Certiorari, p. 4) that "The opinion of the Lower Court is vague and imprecise and so far below the demonstrated abilities of each of the Judges that composed the panel that it is not understandable. Why?", with the imuendoes and implications suggested and raised by such statement of Petitioner's counsel?

Counsel for Respondent do not pretend to know, with certainty, why the Circuit Court chose to comment on the Trial Court's instruction to the jury. However, we suggest that there could be many wholesome reasons for such comment—and we suggest further that it is the duty of lawyers, as officers of the Court, to resolve any doubt as to motivation for a Court's statements and actions in favor of the dignity and bona fides of the Court.

It could well be that the Circuit Court used the instructions as a vehicle for clarifying the question of "agency" and, in fact, this did constitute a sound and logical example of its statement (Application for Certiorari, p. A9) that "this is an area where precise delineation is extremely difficult."

In any event, a contention that the Circuit Court needs "supervision", based on such trivial grounds, is completely devoid of merit.

## D. THE LOWER COURT'S DECISION WAS CORRECT.

In regard to this question, it would be difficult, if not impossible, to present a more forceful argument as to the correctness of the lower Court's decision than is contained in the decision itself, and, in the main, Respondent submits the decision and opinion of the lower Court, together with the citations of authority contained therein, as sufficient argument thereon.

Since it would serve no useful purpose to repeat the decision and opinion of the lower Court in this brief, Respondent will not burden this Court with such repetition. However, Respondent does desire to point out certain portions of the decision and opinion of the lower Court which seem particularly persuasive. In addition, contained herein will be certain statements from tribunals considering this case in independent proceedings which Petitioner saw fit to omit from its Application for Certiorari.

As pointed out by the lower Court, the extremely close relationship between the Service Cartage Company and Petitioner is forcefully illustrated by the fact that Viness, one of the partners in Service, exercised almost exclusive supervision over the over-the-road drivers of Petitioner, those drivers being members of Respondent local union and being the drivers over whom the dispute arose. Mr. Viness ceased to exercise such supervisory and managerial function over such employees only when there were no longer any drivers to supervise, and not because he was dis-

inclined to serve as their supervisor, nor because Petitioner wished that he no longer do so. As stated by the Circuit Court (Petitioner's Application for Certiorari, p. A17) the facts show that "insofar as Empire and Service were concerned, they were satisfied to have Viness continue as he had." And any revocation of authority to supervise the drivers "— came after the over-the-road drivers refused to drive, when there was no one for Viness to supervise. And once the strike began, and it began when the drivers refused to drive, the employer could not make a change in form which would deprive the strikers of the right to call on their fellow drivers to support their action."

Again, as pointed out by the lower Court, (Petitioner's Application for Certiorari, p. A16) the situation prior to August 1, 1955, when ACA was in existence, is revealing. At that time the employees later employed by Service were engaged in local cartage work and were the employees of ACA doing the same work. Prior to August 1, 1955, the five over-the-road drivers were also employees of ACA, performing the same services they subsequently performed for Petitioner. As stated by the lower Court:

> "Had the over-the-road drivers struck when ACA was in existence, it is clear that if they had induced a strike by their fellow employees who were engaged in the local cartage operations, there would not have been an illegal secondary boycott. This would be true because no employees of 'any other employer' had been induced to strike. In what way, if any, did events subse-

> quent to July 31, 1955, convert what would not have been illegal prior to that date into a prescribed secondary boycott? ACA was split in two. The over-the-road drivers were now technically the employees of Empire, while the local employees worked for Service Cartage Company. The economic fortunes of the two companies were as inextricably interwoven as they were when both entities were ACA, and Mr. Viness of Service still retained general supervision of the over-the-road drivers of Empire."

The lower Court, at the end of its opinion, stated, with irrefutable logic, that:

> "The immediately preceding economic history of the two companies, plus the fact that nearly all of Service's business was with Empire, plus the fact that the over-the-road drivers were generally supervised and dispatched by Viness, establishing an overlapping of management functions between Service and Empire, convinces us that Service was not the unconcerned neutral employer whom Sections 8(b)(4) and 303 of the Taft-Hartley Act were designed to protect, and thus that Empire was not the victim of an illegal secondary boycott."

Although Petitioner has chosen to cite to this Court the decision of NLRB when this dispute was before NLRB in an independent proceeding and in which the majority opinion of the Board found against Respondent, Petitioner did not choose to point out to this Court that the Board's decision was not unanimous, nor did he give the benefit of the dissenting opin-

ion to this Court. In order that the Court may have this dissent for consideration, certain excerpts from the dissent by Member Abe Murdock is contained hereinafter. This decision is *Local No. 728 Teamsters and Empire State Express, Inc.*, No. 10-CC-131, 116 NLRB 615. In his dissenting opinion, Member Murdock stated, in part, as follows:

> "In finding that Service was an independent contractor the majority p'aces great reliance upon the fact that Service ceased dispatching Empire's drivers on August 29 before the picketing began. It seems to me that this circumstance is not in and of itself sufficient to warrant the conclusion that Service had ceased acting as Empire's agent in Atlanta. It is well settled law that 'acquiesence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future.'—Empire had no need to dispatch drivers from Atlanta after August 26 because from that date the Atlanta drivers were voluntarily withholding their services pending settlement of their dispute. The fact that Service ceased dispatching drivers on that date does not mean that its authority to act as Empire's agent in Atlanta had been revoked or that it might not in the future resume such services if Empire should have need of them. — Together with Empire, the Service partnership constituted the emp'oyer under the express definition of Section 2(2) of the Act, engaged in a labor dispute with the Respondent at the Atlanta premises.

"Accordingly, as only one employer is involved in this case, I would affirm the Trial Examiner's ultimate conclusion and dismiss this complaint in its entirety."

Petitioner has also seen fit to refer to the temporary injunction which was issued pursuant to Section 10(1), National Labor Relations Act, as amended, in an independent proceeding prior to institution of the case at bar. This case was *John W. Thomas, Acting Regional Director of the Tenth Region of the National Labor Relations Board for and on behalf of the National Labor Relations Board, Petitioner v. Truck Drivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent*, Civil Action No. 5382, United States District Court, Northern District of Georgia, Atlanta Division. In that case District Judge Boyd Sloan entered an order of temporary injunction enjoining the picketing on November 3, 1955. However, in his opinion in the case, the District Judge had this to say:

"In respect to the following findings in which the Court holds that the Petitioner has reasonable cause to believe that Empire and Cartage are two independently operated businesses, etc. this Court feels impelled to state that if it was free to make its own determination of this controverted issue, it would be inclined to the view that the relationship between Cartage and Empire is so close that Cartage should be regarded as an ally of Empire. *While this Court, if free to do so, would*

> *hold that Cartage was not such a disinterested neutral or secondary employer as to come within the protection of the Act*, the Court must concede that there is evidence which would authorize the Petitioner to reach the conclusion which he has obviously reached, and so—" (Emphasis supplied).

(The name "Cartage" as used in Judge Sloan's opinion refers to Service Cartage Company.)

(Insofar as can be ascertained by Respondent's counsel the above District Court's decision has not been officially reported.)

It is respectfully submitted that there was no error committed by the Circuit Court in the case involved.

## VII. CONCLUSION

Respondent submits that the Petition for Certiorari should be denied by this Court and Respondent respectfully prays that the petition for Certiorari be so denied by this Court.

This the 20 day of October, 1961.

Respectfully submitted,

/s/ Edwin M. Pearce
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of Counsel for Respondent

## CERTIFICATE OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

I, Edwin M. Pearce, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served the Petitioner in the captioned case with the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari by mailing, with proper postage affixed, two copies of said printed Brief to counsel for Petitioner, Mr. W. Edward Swinson, Attorney at Law, 1214 Third Avenue, P. O. Box 548, Columbus, Georgia.

This 20th day of October, 1961.

/s/ Edwin M. Pearce
Edwin M. Pearce
of Counsel for Respondent

Address:
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

## No. 458.

EMPIRE STATE EXPRESS, INC.,
*Petitioner.*

vs.

TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
*Respondent.*

## REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI.

W. EDWARD SWINSON,
Columbus, Georgia,
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Atlanta, Georgia,
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

## No. 458.

EMPIRE STATE EXPRESS, INC.,
*Petitioner.*

vs.

TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
*Respondent.*

## REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI.

Petitioner, Empire State Express, Inc., believes it to be necessary and perhaps useful to this Court to file this Reply Brief.

### I. OPINION BELOW.

Since the opinion of the Court below (Appendix A, pp. A1-A18 of the Petition) had not been published at the

time the Petition was filed, but now is published, we supply the information: 293 F.2d Advance Sheet No. 3, pp. 414-423.

## II. ARGUMENT IN REPLY.

1. On page 9 of the Brief in Opposition, Respondent makes the statement that "there was uncontradicted testimony that Mr. Viness acted as Petitioner's agent in regard to Petitioner's labor relations" (R. 712, 713). Cook, President of Respondent, and the witness testifying, contradicted his own testimony in that respect on Cross-Examination. See Petition for Certiorari, pp. 30-36. In this regard, where is there a good faith basis for the statement or argument made by Respondent? Respondent here is attempting to assert that the "uncontradicted testimony" shows Viness was an agent of Petitioner in the field of labor relations, when the evidence does not establish that fact, uncontradicted or otherwise. If that one fact were true and Viness was acting as a member of the partnership of Service Cartage Company, thus making Service such an agent for Petitioner, Petitioner would be compelled to admit that Petitioner and Service were not two "persons" or two "employers" within the meaning of the Act. The contradiction existing in the Direct Examination and the Cross-Examination of Cook, standing alone, justified the District Judge in submitting the cause to the jury.

2. On page 10 of the Brief in Opposition, Respondent states that the "local drivers" did not know they were working for or employed by Service, but thought they worked for Petitioner. In that statement, Respondent is not referring to the five over-the-road drivers who worked for Petitioner until August 26, 1955, but to employees of

Service Cartage Company. The first witness, Tate, whose testimony appears in the Record pp. 695-701 testified (Rec. 696):

> "Q. Bishop, where are you employed? A. Well, I work, I guess it is Empire State.
>
> "Q. Well, who pays you? A. Jack Viness pays me."

Petitioner invites this Court to read the remaining testimony of Tate (Rec. pp. 695-701), and requests this Court then to decide if that testimony amounts to "enmeshment" of the labor relations of the employees of Petitioner and Service, or that the employees of Petitioner and of Service were "so intertwined with respect to employment" that Service "was not protected" by the Act as another "person" and another "employer." Does not the answer "Jack Viness pays me" mean unqualifiedly that Tate was an employee of Service? The second witness for Respondent, Malloy, who also worked for Service, testified he knew he worked for Service (and not Petitioner) about two weeks after he began to work on August 1, 1955, when he received his first pay check from Service: but the testimony in that respect is not clear. Also it is a fact not to be disputed that Malloy received his first pay from Service sometime before the five over-the-road drivers working for Petitioner quit work on August 26, 1955. We invite this Court to read the testimony of Malloy (Rec. pp. 702-706); and it will be seen that Malloy knew that Petitioner and Service were, without regard to legal technicalities, two separate employers.

3. On pages 17 and 18 of the Brief in Opposition, Respondent cites *Local No. 24* v. *NLRB*, 1958, 266 F.2d 675, 680, and quotes from the opinion of Chief Judge Prettyman. In *Local No. 24* v. *NLRB*, *supra*, Judge Prettyman

was faced with real and truly complicated "enmeshment" and "intertwinement" and not as in this case sham, or trivial or lawyer-built "enmeshment" or "intertwinement." In Local No. 24, Judge Prettyman, because the relationship between the control of the employees of the purported primary employer and of the purported secondary employer, and the control of the labor relations of both groups of employees by the purported primary employer, could truthfully take the position that the relationship of independent contractor did not exist between the two within the meaning of this Act. And Judge Prettyman was justified in holding "We need not devise a new word to describe the relationship here depicted." We call this Court's attention to the fact that when any of our courts have looked through form to substance, the pattern followed has been to hold that form will be ignored and substance adopted, and our courts generally do not regard it necessary to define the adopted substance. The whole point is that "form" is disregarded.

The opinion of Judge Prettyman is soundly based on the true test: Is the secondary employer, because of his relations with his own employees and because of his relations with the employees of the primary employer, truly and directly interested in the labor dispute between the primary employer and his employees, so that the secondary employer may not be a neutral to the labor dispute?

In Local No. 24, because of the language of the independent contractor agreements, and the operation practices followed with regard to employees of the primary employer and many similar operation practices followed with regard to employees of the secondary employer, it was impossible to draw a line or to fix a point where it could be reasonably said the interest of the secondary employer in the labor dispute began or ended. Hence, the

interest in the labor dispute was determined to extend to the point where the secondary employer was declared not to be a "neutral" employer. In this case now before this Court, there is a difference as night from day. The relationship between Petitioner and Service is simple not complex. It comes to this: are the few, simple and clear facts relied on by Respondent regarding the relationship between Petitioner, a corporation, and Service, a partnership, sufficient upon which to base a sound conclusion that Service was interested in the labor dispute between Petitioner and Respondent? We assert that a thorough understanding of the facts will dissipate and destroy such a conclusion.

4. On page 19 of the Brief in Opposition, Respondent asks the question:

> "Is the intent of the statute not clear by this time?"

The answer is "Yes, the 'intent' is clear, but the application of the intention of the statute is not." That is true since this Court on May 29, 1961, in *Local 761, E.R.&M. Workers,* 6 L. Ed. 2d Adv. Sheet, Vol. 4, page 592. 81 S. Ct. 1285, published its opinion. It is now clear that the language of the statute "cannot be literally applied." It is clear that a *bona fide* relationship of independent contractor on the part of the secondary employer with the primary employer does not deny to the secondary employer the protection and benefit of the Act against a boycott prohibited by the Act. It is not yet entirely clear as to the character of the interest which must be possessed by the secondary employer to qualify the secondary employer for the benefit and protection of the Act or to disqualify the secondary employer for such protection. Is the "interest" referred to an interest in the labor dispute,

or an interest in a common endeavor or common business venture? This question needs to be answered by this Court. We contend and assert that the interest held by the secondary employer must be an "interest" in the labor dispute. If this Court is of that view, then, since the contract between Petitioner and Service created a *bona fide* relationship of independent contractor (and no single term of the contract is disputed), the question is, should the credible and uncontradicted testimony relied upon by Respondent disqualify Service as another "person" and another "employer" from Petitioner? We say that the position of Respondent travels from the absurd to the ridiculous.

5. Attorneys for Petitioner stated in the Petition and now reiterate that the Fifth Circuit "usurped the function of the jury." We did not make any insinuations, improper or otherwise, against the Judges composing the panel of the Lower Court; nor did we attack, or detract from, the dignity of that Court. We simply acted and frankly said what we thought was demanded because of what in our opinion was a serious or large error as distinguished from an error we thought to be slight or small. Usurpation of the function of a jury is fundamental, whether or not it innocently or wilfully occurs, and deserves tough hard language and condemnation. In the case at bar, we believe it occurred; and that it is present on the most vital point in the action, the same being: Was or was not Service an agent of Petitioner in regard to Petitioner's labor relations with the employees of Petitioner? Respondent contended and contends Service was an agent of Petitioner of the kind and to the extent to disqualify Service from the protection of the Act. Petitioner on the other hand contended and contends that proof of such agency was entirely insufficient.

Petitioner has pointed out above and in the argument supporting the Petition, that the testimony of Cook, President of Respondent, does not justify the conclusion of that sort of agency. In addition, the testimony of Mathis, Secretary-Treasurer of Respondent, shows that Mathis dealt with Rowlenson and Livingston, officers of Petitioner, and not with Service or Viness, with regard to representing the employees of Petitioner. See Rec., p. 625, where Mathis stated "* * * I advised him (Rowlenson) I would send the contracts (union) to his office in Columbus for signature;" and see Rec., pp. 628-630 where Mathis testified about the meeting in Columbus, regarding representation of the employees of Petitioner by Respondent, between Mathis representing Respondent and Livingston, Rowlenson and Swinson representing Petitioner. Also, Swinson's testimony in regard to that meeting in Columbus is set forth in the Petition, pp. 14-17. But more to the point, Mathis testified on direct and on cross-examination that Rowlenson in Atlanta told him that (Direct, Rec., p. 625):

> "He then advised me that Jack Viness would be his agent in Atlanta, and asked if it was agreeable with me. I said yes, that we had dealt with Jack Viness for a number of years and knew him well."

To the same effect Mathis testified on cross-examination (Rec., pp. 663-664), and also testified he asked Livingston and Rowlenson to sign the two union contracts covering all employees of Petitioner (Rec., p. 664).

It will be noted that Mathis did not testify that Rowlenson or Livingston told him that "Viness was to be the agent" of Petitioner in Atlanta in charge of the labor relations of Petitioner with its employees. Mathis used the word "agent" without further explanation or qualification. In that regard, Respondent contended that Mathis'

testimony meant that Viness was to act as the "agent" of Petitioner in labor relations or was to act generally as an agent of Petitioner, by whose acts Petitioner would be bound; and Petitioner contended that the meaning of the term "agent" by Mathis meant that Service and Viness were to represent Petitioner in Atlanta as an independent contractor in the cartage business, and not generally as an agent or as an agent in charge of the labor relations, or any part thereof, of Petitioner. Here again, there was controversy as to a factual situation, which justified the District Judge in calling upon the jury to decide what the true situation was with regard to agency.

Moreover, and to cap it all, Viness testified (Rec., p. 415):

> "* * * I asked him (Johnson, an agent of Respondent) why he was going to strike me (Service Cartage Co.) and he said because I represented Empire State Express (Petitioner), and I told him I had nothing to do with Empire's labor disputes and he (Johnson) said, well, nevertheless, at 10:30 we are going to strike you. It turned out he struck me at ten o'clock instead of ten-thirty."

The foregoing testimony of Viness is undisputed; it is contradictory to the testimony of Mathis, and conflicts with the meaning Respondent has attempted to add to the Mathis testimony as to Viness being an agent of Petitioner. The District Judge submitted that conflict and contradiction in the testimony to the jury, to determine whether Service was an agent generally for Petitioner or as an agent for the labor relations of Petitioner.

*The Fifth Circuit also disregarded the cross-examination of both Cook and Mathis by which Cook and Mathis were each impeached, entitling petitioner to have the cause*

*submitted to the jury* (Cook, Rec., pp. 723-726; Mathis, Rec., pp. 664-678).

To the minds of Attorneys for Petitioner, the fact that the Fifth Circuit Court disregarded or ignored the conflicts and contradictions referred to above, and decided that the District Judge should have directed a verdict clearly demonstrates that the Lower Court did usurp the functions of the jury.

True it is, that Attorneys for Petitioner in the Petition, made the statements quoted on pages 20 and 21 of Respondent's Brief in Opposition, but, without further explanation, we stand upon the following statement made by Attorneys for Petitioner and quoted on page 4 of the Petition for Certiorari:

> "There were controverted questions of fact, and Petitioner and Respondent placed different interpretations on proven facts, all submitted to the jury for verdict; but nevertheless, the lower Court usurped the function of the jury in passing on such issues * * *."

True it also is, that Attorneys for Petitioner, at the close of the testimony, made a motion for directed verdict on liability or the boycott issue alone, with the question of damages to be left to the jury, and in the language quoted at the top of page 22 of Respondent's Brief. The District Judge overruled that Motion, and submitted the whole cause to the jury. But the District Judge said that, while the Motion had strong appeal, "* * * I'm simply saying that the wise thing to do at this moment is to let the jury pass upon that question."

But more important to the present discussion, Swinson, an Attorney for Respondent, acquiesced in the unfavorable ruling made on the Motion by the District Judge, in the following language:

"I'm inclined to think Your Honor is correct, if that remark is necessary to the record."

(For Motion and remarks of Attorneys, see Rec., pp. 734-744.)

Certainly, it is not unfair to assert now that Swinson was cognizant of the controversy existing in the testimony and between Petitioner and Respondent which required the District Judge to submit the boycott and liability question to the jury.

How can Respondent legitimately and soundly argue in effect that Petitioner is estopped from taking the position in this Court that, in regard to boycott, there were no controverted questions of fact to be passed on by the jury?

And again, with all due respect, we ask, why did the Fifth Circuit overlook or ignore the controversies clearly amounting to jury questions pointed out above, and decide there was no prohibited boycott? What the lower Court did do in arriving at that result was to select a few items or parts of the testimony supporting its opinion and judgment while disregarding or ignoring the preponderance of the testimony to the contrary, thus refusing to look at the evidence as a whole and attempting to give weighted balance thereto.

6. On page 26 of the Brief in Opposition, Respondent made the old, and as far as this action is concerned, the time-worn argument (accepted and followed by the Trial Examiner and by the dissenting member of the NLRB, but rejected by the NLRB decision, No. 10-CC-131, 116 NLRB 615, and clasped again to the breast of the Lower Court in its opinion), that "the strike * * * began" on August 26, 1955 "when the drivers refused to drive," and did not begin on September 13, 1955, when the picket line

was established and the boycott, if any, began to be committed.

Suppose we lay this argument at rest. If when the drivers, being intoxicated, refused to drive the trucks of Petitioner on August 26, 1955, and never returned to work for Petitioner, that amounted to a strike on August 26 and such strike continued thereafter (and for this proceeding that this Petitioner does not deny), then, there were two strikes beginning on separate and different dates: the first on August 26 and the second on September 13, 1955. The second strike was not a strike of the employees of Petitioner; it was a strike induced, encouraged and ordered by Respondent of employees of Service Cartage Company to compel Service to cease doing business with Petitioner and others; and this strike alone, by itself and without regard to what happened prior to September 13 amounted to a prohibited boycott under the Act, unless Service was and is to be disqualified as another "person" or another "employer" under the Act. Conclusive and uncontradicted proof of this position is provided by the statement of Johnson, an agent of Respondent, made to Viness of Service on the morning of September 13, 1955, when the employees of Service struck and formed the picket lines. Johnson, after being told that neither Service nor Viness "had" anything "to do with Empire's labor disputes," said "* * * nevertheless, at 10:30 we are going to strike you (Service)."

Sometimes, it is very hard to make the truth appear. In recent years and in many fields, time and time again it has been demonstrated that a fallacious statement or argument, rigidly and persistently adhered to on all occasions, has blanked out and overridden the truth. The NLRB, with what we believe to be sound reason and logic, refused to let that occur. And while we think this did happen in

the Fifth Circuit, we find ourselves with strong and confident faith that this Court will refuse to confirm the injustice, if this Court should believe that Petitioner is correct.

7. While NLRB case *Local 728, Teamsters and Empire State*, No. 10-CC-131, 116 NLRB 615, is not cited in this Court's May 29, 1961, opinion in *Local 761* v. *NLRB*, 6 L.Ed.2d Adv. Sheet No. 4, page 592, Attorneys for Petitioner believe the decision in *Local 728, supra*, to be one of the long line of NLRB decisions which formed the developing change in the views of the Board described by this Court in Local 761, *supra;* particularly with regard to a strike on premises commonly occupied and used by several employers, and with regard to strike signs which do not fully make clear the exact employer or employers against whom the strike is directed.

8. With respect to the power of "supervision" residing in this Court to "supervise," when it is deemed appropriate by this Court, the judgment and orders of a Circuit Court, Attorneys for Petitioner wish to add the following.

If "usurpation of the functions of the jury" has been established to the point where an injustice has been done Petitioner, in that Petitioner was and is entitled to have a jury pass on the boycott question, and that the Lower Court has denied, then this Court may order that the power of "supervision" will be exercised.

The references made in the Petition for Certiorari by Attorneys for Petitioner with respect to the comments of the Fifth Circuit on the Charge to the Jury delivered by the District Judge, and to the direction to grant the Motion for judgment notwithstanding verdict were intended to have no more effect than to indicate "unusual depar-

tures," and to emphasize the overall conclusion that the "usurpation" together with such "departures" had worked an injustice upon Petitioner.

9. Attorneys for Petitioner are not requesting or urging this Court "to place a strait-jacket of legal formulae" in the announcement of a new rule or guide for the future as argued by Respondent's Brief, pages 16-19.

We are respectfully suggesting that it would be beneficial to the federal courts and the NLRB to have a "neutral employer" or an "unconcerned employer" defined in a broad manner with room for future change, and particularly with respect to the kind of interest such an employer must have to qualify that employer to be regarded as another "person" or another "employer" from the primary employer. From our study and reflection, we believe that "interest" should be confined to a true or common interest with the primary employer in the labor dispute, and not be directed against a common venture or common business interest in which both employers may be said to be interested, when as a matter of truth and fact the secondary employer may be truthfully said to have no real interest in the labor dispute between the primary employer and the employees of the primary employer.

10. On pages 29 and 30 of the Brief in Opposition, Respondent quotes from the opinion of Judge Sloan in the injunction case brought by the Board, under Section 10(1) of the Act against Respondent, stating that if he (Judge Sloan) were "free to make its own determination of this controverted issue, it (he) would be inclined" to rule that

Service was "an ally of Empire" or "was not such a disinterested neutral" * * * "as to come within the protection of the Act."

Firstly, Judge Sloan was not required by the law to try the issue on the merits, but only to decide if there was "reasonable cause to believe" a boycott may have been committed.

Secondly, Judge Sloan did not hear the evidence introduced before the NLRB; and the Board did decide that Service was not "an ally" of Petitioner but was a "neutral employer."

Thirdly, Judge Sloan did not hear the evidence in this cause in the District Court, and the District Judge certainly thought the Petitioner had made out a *prima facie* case and was entitled to have the boycott question decided by a jury.

Fourthly, the Fifth Circuit Court knew Judge Sloan's statement to be what it was, pure dicta without any basis of evidence to support it, and the Fifth Circuit did not cite or rely on the unsupported opinion of Judge Sloan.

## III. CONCLUSION.

Attorneys for Petitioner will greatly appreciate the courtesy from this Court of receiving and considering this Brief in reply to the Brief in Opposition of Respondent in connection with making the decision as to whether or not to grant the Writ of Certiorari in this proceeding.

This 25th day of October, 1961.

Respectfully submitted,

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## CERTIFICATE OF SERVICE.

STATE OF GEORGIA,
COUNTY OF MUSCOGEE.

I, W. Edward Swinson, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served Respondent in the captioned case with the foregoing Reply Brief responding to Respondent's Brief in Opposition to the Petition for Writ of Certiorari, by mailing, with proper postage affixed, two copies of said printed Reply Brief to Counsel for Respondent,

Messrs. Poole, Pearce & Hall, John S. Patton, and William B. Paul, 1642 Bank of Georgia Building, Atlanta 3, Georgia.

This 28 day of Oct. , 1961.

W. Edward Swinson

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